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FCC Record

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

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Federal Communications Commission Record

Volume 8
Issue 5

Table of Contents

Table of Cases..... i

Table of FCC and Delegated Authority Numbers..... iv

Table of Docket Numbers..... vi

Table of Rulemaking Numbers..... vii

Table of Localities..... viii

Table by Subject Matter..... ix

Table by Statutory and Rule Provisions..... xiii

Decisions, Reports, Memorandum Opinions, Orders, and Other Selected Material..... 1140

Federal Communications Commission Record

Table of Cases
Volume 8
Issue 5

Case Name	Page
AT&T's Petition to Modify Part 61	1421
Allnet Communication Services, Inc.	1252
Allnet Communication Services, Inc.	1347
Allnet Communication Services, Inc.	1422
Amendment of Part 22 - Cellular Geographic Service Areas	1363
Amendment of Part 25 - Satellite Communication Services	1316
Amendment of Part 74 - Instructional Television Fixed Service	1275
Amendment of Part 76 - Network-Cable Cross-Ownership	1184
Amendment of Part 90 - Emergency Medical Radio Service	1454
Amendment of Parts 1, 2 and 21 - Use of Frequencies	1444
Amendment of Parts 2 and 90 - Specialized Mobile Radio	1469
American Network Exchange, Inc.	1198
American Network Exchange, Inc.	1195
American Network Exchange, Inc.	1196
American Sharecom, Inc.	1171
Annual Report Form M	1311
Atlantic Radio Communications	1383
BellSouth Telecommunications, Inc.	1403
Brightstar Communications Limited	1387
CCI RSA, Inc.	1183
CCT, Inc.	1361
COM Systems, Inc.	1140
Cable TV Act of 1992 - Cable Home Wiring	1435
Cable TV Act of 1992 - Public Service Obligations	1589
Cable TV Act of 1992 - Sports Programming Migration	1492
Cellular Telecommunications Industry Association	1412
Columbia Communications Corporation	1603
Communications Satellite Corporation	1578
Communications Satellite Corporation	1531
Communications Satellite Corporation (ERRATUM)	1432
Competitive Telecommunications Association	1224
DEAS Communications, Inc.	1213
Evergreen Media Corporation of Chicago AM	1266
Expanded Interconnection with Local Telephone Company Facilities	1502
Expanded Interconnection with Local Telephone Company Facilities	1468
FCVS Communications	1279
FM 104.9 Broadcasting	1393
Fee Decisions of the Managing Director	1604
Fitts, William E.	1271
GTE Hawaiian Telephone Co. Inc.	1217
Gaines, Bennett Gilbert	1405

Case Name	Page
Hanna, Robert D.	1582
High Tech Communications of Iowa, Inc.	1580
Interactive Video and Data Service	1418
Interpretation - Direct Assignment in the Separations Process	1558
Interstate Access Tariff and Revenue Distribution Processes	1503
King Kable, Inc.	1515
Line of Site, Inc.	1584
MCI Telecommunications Corporation	1517
MDS Signal Group	1586
MSS Above 1 GHz Negotiated Rulemaking Committee	1513
MSS Above 1 GHz Negotiated Rulemaking Committee	1514
MTX Communications Corp.	1221
Macro Cellular Partners	1541
MidAmerican Long Distance Company	1201
NCR Corporation	1192
National Exchange Carrier Association, Inc.	1315
National Exchange Carrier Association, Inc. - Audit Costs	1312
National Telephone Services, Inc.	1301
Network Telecommunications Services	1219
Nevada Bell	1512
NewSouth Broadcasting, Inc.	1272
Nugget Broadcasting Company	1414
Paul Communications, Inc.	1587
Paul Communications, Inc.	1583
Personal Communications Services - Pioneer's Preference Requests	1511
Pleading Cycle Established for Zone Pricing Plans	1420
Provision of Access for 800 Service	1423
Provision of Access for 800 Service	1402
Quaker State Broadcasting Corp.	1539
Replacement of Part 90 by Part 88	1501
SDK Enterprises	1199
Saltaire Communications, Inc.	1385
San Marcos Long Distance, Inc.	1433
Schuykill Mobile Fone, Inc.	1264
Southwestern Bell Telephone Company	1282
Spectrum Broadcasting Co.	1193
TNI Associates	1601
TRT/FTC International, Inc.	1222
TV 14, Inc.	1540
Table of Allotments, FM, Bay City, Giddings and Cameron, TX	1552
Table of Allotments, FM, Bentonville, AR	1372
Table of Allotments, FM, Columbia Falls, MT	1548
Table of Allotments, FM, Corpus Christi and Three Rivers, TX	1375
Table of Allotments, FM, Crescent North, CA	1381
Table of Allotments, FM, Glenwood Springs, CO	1546

Case Name	Page
Table of Allotments, FM, Hempstead, TX	1374
Table of Allotments, FM, Oakhurst and Firebaugh, CA	1544
Table of Allotments, FM, South Hill, VA	1379
Table of Allotments, FM, Temple, TX	1377
Table of Allotments, FM, Tracy, MN	1550
Table of Allotments, TV, Frederiksted, VI	1557
Tariff Filing Requirements for Nondominant Common Carriers	1395
Telecom*USA, Inc.	1240
Teledial America, Inc.	1151
Telesphere Network, Inc.	1336
Telesphere Network, Inc.	1565
Texas Educational Broadcasting Co-operative, Inc.	1281
Transasia Communications, Inc.	1575
US Sprint Communications Limited Partnership	1288
WJG Maritel Corporation	1431
Welch Communications, Inc.	1285
Western Maine Cellular, Inc. (ERRATUM)	1284
Williams Telecommunications Group, Inc.	1161
Williams Telecommunications Group, Inc.	1197

Table of Cases by Delegated Authority and FCC Number
Volume 8
Issue 5

Delegated Authority or FCC Number	Page
DA 93 - 122	1193
DA 93 - 126	1511
DA 93 - 131	1552
DA 93 - 132	1550
DA 93 - 135	1557
DA 93 - 138	1311
DA 93 - 143	1544
DA 93 - 144	1546
DA 93 - 145	1501
DA 93 - 151	1548
DA 93 - 153	1512
DA 93 - 156	1515
DA 93 - 157	1377
DA 93 - 160	1379
DA 93 - 161	1381
DA 93 - 162	1513
DA 93 - 163	1514
DA 93 - 167	1375
DA 93 - 168	1372
DA 93 - 169	1374
DA 93 - 177	1604
DA 93 - 178	1502
DA 93 - 180	1195
DA 93 - 181	1196
DA 93 - 183	1197
DA 93 - 184	1183
DA 93 - 185	1192
DA 93 - 186	1199
DA 93 - 187	1217
DA 93 - 188	1219
DA 93 - 189	1221
DA 93 - 190	1222
DA 93 - 193	1580
DA 93 - 194	1264
DA 93 - 195	1601
DA 93 - 196	1412
DA 93 - 197	1582
DA 93 - 198	1583
DA 93 - 199	1584
DA 93 - 200	1586
DA 93 - 201	1587
DA 93 - 202	1402
DA 93 - 203	1284
DA 93 - 204	1282
DA 93 - 207	1403
DA 93 - 210	1575
DA 93 - 211	1578
DA 93 - 212	1421
DA 93 - 214	1422
DA 93 - 217	1420
DA 93 - 218	1539
DA 93 - 219	1541
DA 93 - 220	1540
DA 93 - 221	1603
DA 93 - 228	1418
DA 93 - 229	1431
DA 93 - 230	1432
DA 93 - 231	1433
DA 93 - 232	1361
FCC 92 - 569	1198
FCC 93 - 25	1503
FCC 93 - 26	1312
FCC 93 - 27	1315
FCC 93 - 31	1444
FCC 93 - 32	1454
FCC 93 - 38	1316
FCC 93 - 58	1201
FCC 93 - 59	1252
FCC 93 - 60	1140
FCC 93 - 61	1336
FCC 93 - 62	1347
FCC 93 - 63	1171
FCC 93 - 64	1151
FCC 93 - 65	1288
FCC 93 - 66	1161
FCC 93 - 67	1565
FCC 93 - 68	1240
FCC 93 - 70	1517
FCC 93 - 73	1435
FCC 93 - 74	1224
FCC 93 - 76	1301
FCC 93 - 78	1285

Delegated Authority or FCC Number	Page
FCC 93 - 79	1531
FCC 93 - 80	1184
FCC 93 - 84	1423
FCC 93 - 85	1272
FCC 93 - 90	1275
FCC 93 - 91	1589
FCC 93 - 93	1387
FCC 93 - 95	1558
FCC 93 - 96	1468
FCC 93 - 97	1266
FCC 93 - 98	1279
FCC 93 - 99	1363
FCC 93 - 100	1271
FCC 93 - 103	1395
FCC 93 - 106	1383
FCC 93 - 107	1385
FCC 93 - 114	1393
FCC 93D - 6	1213
FCC 93R - 3	1405
FCC 93R - 4	1281
FCC 93R - 5	1414

Federal Communications Commission Record

Table of Cases by Docket Number
Volume 8
Issue 5

Docket Number				Page
CC	Dkt.No.86	-	10	1423
CC	Dkt.No.86	-	10	1402
CC	Dkt.No.86	-	496	1316
CC	Dkt.No.90	-	6	1363
CC	Dkt.No.90	-	132	1421
CC	Dkt.No.91	-	141	1502
CC	Dkt.No.91	-	365	1198
CC	Dkt.No.92	-	141	1468
CC	Dkt.No.92	-	166	1513
CC	Dkt.No.92	-	166	1514
CC	Dkt.No.93	-	6	1503
CC	Dkt.No.93	-	36	1395
GEN	Dkt.No.90	-	314	1511
MM	Dkt.No.82	-	434	1184
MM	Dkt.No.88	-	432	1285
MM	Dkt.No.89	-	459	1552
MM	Dkt.No.90	-	125	1405
MM	Dkt.No.90	-	226	1385
MM	Dkt.No.90	-	503	1414
MM	Dkt.No.90	-	639	1281
MM	Dkt.No.91	-	71	1271
MM	Dkt.No.91	-	193	1375
MM	Dkt.No.91	-	208	1383
MM	Dkt.No.91	-	227	1272
MM	Dkt.No.92	-	111	1213
MM	Dkt.No.92	-	243	1557
MM	Dkt.No.92	-	260	1435
MM	Dkt.No.92	-	279	1374
MM	Dkt.No.92	-	281	1548
MM	Dkt.No.93	-	24	1275
MM	Dkt.No.93	-	25	1589
MM	Dkt.No.93	-	26	1193
MM	Dkt.No.93	-	27	1372
MM	Dkt.No.93	-	29	1377
MM	Dkt.No.93	-	30	1379
MM	Dkt.No.93	-	31	1381
MM	Dkt.No.93	-	32	1550
MM	Dkt.No.93	-	33	1544
MM	Dkt.No.93	-	34	1546
PR	Dkt.No.91	-	72	1454
PR	Dkt.No.92	-	80	1444
PR	Dkt.No.92	-	235	1501

Table of Cases by Rulemaking Number
Volume 8
Issue 5

Rulemaking Number	Page
RM - 4206	1316
RM - 7009	1552
RM - 7260	1552
RM - 7261	1552
RM - 7262	1552
RM - 7263	1552
RM - 7264	1552
RM - 7336	1454
RM - 7700	1557
RM - 7717	1375
RM - 7736	1503
RM - 7822	1375
RM - 8100	1546
RM - 8111	1374
RM - 8118	1548
RM - 8157	1377
RM - 8160	1544
RM - 8162	1381
RM - 8171	1379
RM - 8174	1550
RM - 8178	1372

Table of Cases by City
Volume 8
Issue 5

City/State	Page
Albany, GA	1272
Baltimore, MD	1405
Bay City, TX	1552
Bentonville, AR	1372
Big Canoe, GA	1515
Binghamton, NY	1583
Bowdon, GA	1193
Brenham, TX	1552
Cameron, TX	1552
Centerville, TX	1552
Chicago, IL	1266
Clemson, SC	1393
Columbia, SC	1279
Columbia Falls, MT	1548
Corpus Christi, TX	1375
Crescent North, CA	1381
Dahlonega, GA	1414
Detroit, MI	1431
Dothan, AL	1586
Edna, TX	1552
El Centro, CA	1587
Falls Church, VA	1601
Firebaugh, CA	1544
Flagstaff, AZ	1584
Frederiksted, VI	1557
Ganado, TX	1552
Giddings, TX	1552
Glenwood Springs, CO	1546
Harker Heights, TX	1552
Healdsburg, CA	1213
Hearne, TX	1552
Hempstead, TX	1374
Hornsby, TX	1281
LaGrange, TX	1552
Laughlin, NV	1271
Lawton, OK	1582
Manahawkin, NJ	1383
Marysville, MI	1431
Matagorda, TX	1552
Mechanicsburg, PA	1539
New Ulm, TX	1552
Oakhurst, CA	1544
Oxford, ME	1284
Pawcatuck, CT	1385
Point Comfort, TX	1552
Rollingwood, TX	1552
Rosenberg, TX	1552
Seadrift, TX	1552
South Hill, VA	1379
Swanton, OH	1285
Temple, TX	1377
Three Rivers, TX	1375
Tipton, IA	1580
Tracy, MN	1550
Trevorton, PA	1264
West Palm Beach, FL	1540
Whippany, NJ	1315

Subject — Page

Access Charges
  End users, computation of charges on
  Exchange Carrier Association
    Board of directors and three subsets of membership 1503, 1315
    Exchange Carrier Association, those eligible to 1503, 1312, 1315
    Functions: access charges 1312

Adjudication
  Administrative Law Judge Decision
    Comparative coverage 1414
    Financial qualifications 1285, 1405
    Integration of ownership (qualitative), broadcast experience 1385
    Integration of ownership into management, qualitative aspect 1414
    Misrepresentation and lack of candor 1285
  Review Board or Commission Decision
    Diversification of control of mass media 1213
    Integration of ownership into management, quantitative 1213
    Reopening of record 1213

Broadcast Radio Services - General Rules
  Applications for authorization
    Conflicts in applications, agreement for removing 1383
    FM broadcast and FM translator stations applications: processing 1393
    Inconsistent/conflicting applications, no subsequent 1383
  Changes, renewals in existing stations
    Assignment or transfer of control, application for voluntary 1272
  Program contents
    Contests 1539
    Lottery information 1540

Broadcasting - FM Stations
  Allotments and assignments
    Allotments, table of 1377, 1379, 1381, 1375
    1372, 1374, 1552, 1550
    1544, 1546, 1548

Broadcasting - TV Stations
  Allocations/assignments/licenses
    Table of assignments 1557

Subject	Page
Cable Television Service	
Markets and services	
Crossownership: limitation on cable company carrying a TV signal	1184
Signals significantly viewed, method to determine	1589, 1279
Technical regulations	
Signal leakage performance criteria	1515
Standards: frequencies/signal levels and radiation	1515
Carriers: Service Altered	
Discontinuance/reduction/impairment	
Public coast station, applications to close/reduce service at	1431
Extensions and supplements	
Applications, contents of	1217, 1219, 1221, 1222, 1575, 1578
Commission Organization	
Delegations of authority - Chief, Common Carrier Bureau	
Limitations on delegated authority	1403, 1420
Communications Act of 1934	
Common Carriers	
Complaints to the commission	1201, 1140, 1171, 1151, 1161, 1240, 1517, 1224, 1252, 1288, 1336, 1347, 1565
Extension of lines, certificate for	1217, 1219, 1221, 1222, 1575, 1578, 1431, 1432
Service and charges	1201, 1140, 1171, 1151, 1161, 1240, 1517, 1224, 1252, 1288, 1336, 1347, 1565
Penal provisions; forfeitures	
Rebates and offsets, forfeitures in cases of	1266
Radio, provisions relating to	
Applications;form of and conditions attached to licenses	1603

Subject	Page
Domestic Public Fixed Radio Services	
Applications and licenses, filing requirements	
Amendment of applications	1444
Defective applications	1584, 1586, 1587, 1583
Requirements, general application	1584, 1586, 1587, 1583
Technical content of applications	1444
Applications and licenses, processing	
Dismissal and return	1444, 1584, 1586, 1587 1583
Grants by random selection	1444
Mutually exclusive applications	1444
Opposition to applications	1582
Ownership changes/agreements to amend or dismiss pleadings/applic	1444
Transfer of control/assignment of station authorizations	1444
Jurisdictional Separations Procedures	
Jurisdictional Separations Procedures	
General	1558
Practice and Procedure	
Common carriers: complaints	
Formal or informal	1201, 1140, 1171, 1151 1161, 1240, 1517, 1224 1252, 1288, 1195, 1196 1197, 1336, 1347, 1565
Common carriers: complaints, formal	
Issues amd facts, statement of	1140, 1171, 1151, 1161 1240, 1517, 1224, 1252 1288, 1336, 1347, 1565
Common carriers: financial and accounting reports/requests	
Financial reports, annual	1311
Hearing proceedings: review proceedings	
Exceptions to the initial decision and oral argument	1385
Information, general	
Rules, suspension, amendment, waiver	1282, 1531
Pleadings, briefs	
Pleadings and filing periods, provisions regarding	1531
Stay, cross-reference for a request for a	1281
Private radio services: applications/particular filing rules	
Forms to be used	1201
Proceedings, miscellaneous	
Consent orders	1199, 1541
Forfeiture proceedings	1192, 1199, 1264, 1601 1580, 1541

Subject	Page
Reconsideration/review of Commission action	
Actions by delegated authority, application for review	1285, 1558
Reconsideration of a final FCC action, petition	1584, 1586, 1587, 1393 1583
Public Mobile Service	
Applications and licenses-filing requirements	
Forms and permissive changes or minor modifications	1264, 1601, 1580
Domestic public cellular radio telecommunications service	
Service areas	1363
Special Broadcast Services	
Instructional TV fixed service	
Application, processing of	1275
Tariffs (Schedules of Rates and Regulations)	
Definitions	
Rate increase	1395
Regulations	1395
Supplement	1395

TABLE OF STATUTORY AND RULE PROVISIONS

	Page
000.310(d) Transfer of Control	1405
000.711 Formal or informal complaints	1224
001.002 Declaratory Ruling	1387
001.003 of the Rules	1531
001.043 Requests for Stay	1281
001.045(d) of the Rules	1531
001.080 Forfeiture proceedings	1541
001.080 Forfeiture procedings.	1580
001.080 Forfeiture procedings.	1601
001.093 Consent orders	1541
001.106 Petition for Reconsideration	1586
001.106 Petitions for reconsideration	1393
001.106 Petition for Reconsideration	1587
001.106 Petition for Reconsideration	1584
001.106 Petition for Reconsideration	1583
001.115 Application for Review	1271
001.277 Exceptions	1385
001.711 Formal or informal complaints	1288
001.711 Formal or informal complaints	1336
001.711 Formal or informal complaints	1201
001.711 Formal or informal complaints	1301
001.711 Formal or informal complaints	1347
001.711 Formal or informal complaints	1196
001.711 Formal or informal complaints	1171
001.711 Formal or informal complaints	1517
001.711 Formal or informal complaints	1161
001.711 Formal or informal complaints	1140
001.711 Formal or informal complaints	1151
001.711 Formal or informal complaints	1565
001.711 Formal or informal complaints	1240
001.711 Formal or informal complaints	1252
001.711 Formal or informal complaints	1197
001.711 Formal or informal complaints	1195
001.722 Damages	1301
001.722 Damages	1240
001.722 Damages	1171
001.722 Damages	1517
001.722 Damages	1151
001.722 Damages	1565
001.722 Damages	1201
001.722 Damages	1347
001.722 Damages	1161
001.722 Damages	1140
001.722 Damages	1336
001.722 Damages	1288
001.722 Damages	1252
001.722 Damages	1224
001.785 Annual Financial Reports	1311
001.800 Forfeiture proceedings.	1199
001.800 Forfeiture Proceedings	1192

001.800 Forfeiture procedings. 1264
001.930 Consent orders. 1199
021.013(c) Failure to submit information 1584
021.013(c) Failure to submit information 1583
021.013(c) Failure to submit information 1586
021.013(c) Failure to submit information 1587
021.020(d) Failure to timely comply with information request 1586
021.020(d) Failure to timely comply with information request 1584
021.020(d) Failure to timely comply with information request 1587
021.020(d) Failure to timely comply with information request 1583
021.028(d) Dismissal for failure to prosecute or respond 1584
021.028(d) Dismissal for failure to prosecute or respond 1587
021.028(d) Dismissal for failure to prosecute or respond 1586
021.028(d) Dismissal for failure to prosecute or respond 1583
021.030 Opposition to applications 1582
021.150(a) Site availability requirement 1444
021.230 Amendment of applications 1444
021.280 Dismissal for MDS ownership changes 1444
021.290(f) MDS ownership changes prohibition 1444
021.310(e)(3) Newly-filed treatment for MDS ownership change 1444
021.310(e)(4) Newly-filed treatment for MDS settlements 1444
021.330 Grants by random selection 1444
021.390 (a) MDS assignment and transfer prohibition 1444
021.902(c)(1) MDS 100-mile interference study requirement 1444
021.902(c)(2) MDS protected service area map requirement 1444
021.913(g) MDS low power signal booster certification 1444
021.915 One-to-a-market requirement 1444
022.009 Standard Application Forms. 1580
022.009 Standard Application Forms. 1601
022.900 Standard Application Forms. 1264
022.903 Cellular Geographic Service Area 1363
061.020, 061.021, 061.022, 061.023 1395
063.001 Contents of Application 1433
063.001 Contents of Application 1361
063.001 Contents of Application 1578
063.001 Contents of Applications 1575
063.001 Contents of Application 1222
063.001 Contents of Applications 1219
063.001 Contents of Application 1217
063.01 Contents of Applications 1221
063.069 Contents of Application to close or Reduce Hours of 1431
069.601 Exchange carrier association 1312
069.601 Exchange carrier association 1315
069.601 Exchange carrier association 1503
069.602 Board of directors 1315
069.602 Board of directors 1503
069.603 Association functions 1312
069.605 Reporting and distribution of pool access revenues 1315
069.605 Reporting and distribution of pool access revenues 1503
069.605 Reporting and distribution of pool access revenues 1312
073.1211 Broadcast of Lottery Information 1540
073.1216 Licensee conducted contests 1539
073.202 FM Table of Allotments 1381
073.202 FM Table of Allotments 1377

073.202 FM Table of Allotments 1375
073.202 FM Table of Allotments 1374
073.202 FM Table of Allotments 1372
073.202 FM Table of Allotments 1548
073.202 FM Table of Allotments 1550
073.202 FM Table of Allotments 1546
073.202 FM Table of Allotments 1544
073.202, FM Table of Allotments 1552
073.3518 Inconsistent or conflicting applications 1383
073.3525 Agreements for removing application conflicts 1383
073.3540 Application for Voluntary Assignment 1272
073.3573 Processing FM broadcast station applications 1393
073.606 TV Table of Allotments 1557
074.911 Processing of ITFS station applications 1275
074.985(g) ITFS low power signal booster certification 1444
076.005 Definitions 1435
076.054 Significantly Viewed Signals. 1279
076.501 Cross-Ownership 1184
076.801 Scope 1435
076.802 Disposition of Cable Home Wiring 1435
090.027 Emergency Medical Radio Service 1454
090.053 Frequencies available 1454
090.055 Paging operations 1454
090.135 Modification of license 1469
090.155 Time in which station must be placed in operation 1469
090.611 Processing of applications 1469
095.815 License application 1418
226(a) 1198
300.201 Service and Charges 1171
300.201 Service and Charges 1151
300.201 Service and Charges 1201
300.201 Service and Charges 1140
300.201 Service and Charges 1252
300.201 Service and Charges 1161
300.201 Service and Charges 1240
300.201 Service and Charges 1565
300.201 Service and Charges 1347
300.201 Service and Charges 1224
300.201 Service and Charges 1336
300.201 Service and Charges 1517
300.201 Service and Charges 1301
300.201 Service and Charges 1288
300.208 Complaints to the Commission 1201
300.208 Complaints to the Commission 1252
300.208 Complaints to the Commission 1161
300.208 Complaints to the Commission 1240
300.208 Complaints to the Commission 1565
300.208 Complaints to the Commission 1347
300.208 Complaints to the Commission 1224
300.208 Complaints to the Commission 1336
300.208 Complaints to the Commission 1517
300.208 Complaints to the Commission 1140
300.208 Complaints to the Commission 1301
300.208 Complaints to the Commission 1288

300.208 Complaints to the Commission 1171
300.208 Complaints to the Commission 1151
300.214 Extension of Lines 1433
300.214 Extension of Lines 1432
300.214 Extension of Lines 1431
300.214 Extension of Lines 1578
300.214 Extension of Lines 1575
300.214 Extension of Lines 1361
300.214 Extension of Lines 1222
300.214 Extension of Lines 1221
300.214 Extension of Lines 1219
300.214 Extension of Lines 1217
300.309 Action Upon Applications 1603
300.503(b) Forfeitures (Notice of Apparent Liability) 1266
300.702 Comm. Satl. Act, Definitions 1387
300.721 Comm. Satl. Act, Implementation of Policy 1387
400.181304 Broadcasting Lottery Information 1540
400.181464 Broadcasting Obscene or Indecent Language 1266
47 C.F.R. Section 1.3 waiver of rules 1282
47 USC § 153, 47 CFR, Part 69 1423
47 CFR Part 69 1422
47 CFR Section 61 1421
47 C.F.R. Section 0.291 delegated authority 1420
47 C.F.R. sections 61.38 and 61.58 1412
47 C.F.R. Section 0.291 delegated authority 1403
47 CFR Part 69 Access Charges 1402
47 CFR Sections 1.115,36.1 et seq. 1558
47 CFR Section 64.1401 - 64.1402, Expanded Interconnection 1502
47 CFR Parts 61, 64, 65, 69 1468
500.100 HDO 1193
500.2035 Integration of Ownership into Management, quantitat 1213
500.2045 Diversification of Control of Mass Media 1213
500.3005 Integration, Qualititative Aspect 1414
500.3010 Amendment of application, good cause 1385
500.3019 Applications, completeness 1385
500.3059 Enlargement of issues, sufficiency 1385
500.3065 Comparative Coverage 1414
500.3161 Site availability 1385
500.3170 Financial Qualifications 1405
500.3210 standing 1383
500.335 Integration, Quantitative Aspect 1271
Jurisdictional Separations Process, AAD91-48 1558
Part 25 Satellite Communications 1316
Report and Order 1435

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COM SYSTEMS, INC.,
Complainant,

v.

PACIFIC BELL TELEPHONE COMPANY, and THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,
Defendants.

File No. E-89-420
File No. E-89-421

MEMORANDUM OPINION AND ORDER

Adopted: January 29, 1993; Released: February 23, 1993

By the Commission:

TABLE OF CONTENTS

Topic	Paragraph No.
I. INTRODUCTION	1
II. BACKGROUND	2 - 4
III. DISCUSSION	5 - 45
A. Liability for Damages	5 - 17
1. Contentions of the Parties	5 - 12
2. Discussion	13 - 17
B. Damages and Interest Claims	18 - 44
1. Damages	18 - 42
a. Contentions of the Parties	18 - 29
b. Discussion	30 - 42
2. Interest on Damages	43 - 45
a. Contentions of the Parties	43 - 44
b. Discussion	45
IV. CONCLUSION	46
V. ORDERING CLAUSES	47 - 54

I. INTRODUCTION

1. In this Memorandum Opinion and Order we find that Com Systems, Inc. (Com Systems) has met its burden of establishing that defendant local exchange carriers[1] (LECs) have violated Section 201(b) of the Communications Act by earning in excess of the rate of return prescribed by the Commission for the period October 1, 1985 through December 31, 1986. In addition, we award Com Systems damages and interest for defendants' rate of return violations.

II. BACKGROUND

2. The Commission has previously held that LECs who had earned in excess of the prescribed rate of return for October 1, 1985 through December 31, 1986 violated Section 201(b) of the Communications Act (the "Act").[2] These decisions firmly establish that carrier rates producing earnings in excess of the Commission's prescribed rate of return violate Section 201(b) of the Act[3] and allegations of such overearnings are sufficient to sustain a cause of action under Section 208 of the Act. Furthermore, the Commission has held that complainants may recover damages, including interest, from LECs who violated the Commission's rate of return prescription.[4]

3. While a detailed accounting of the applicable statutory scheme and relevant Commission and court decisions that preceded the filing of the captioned complaints is set forth in the *MCI Liability Order*[5] and will not be repeated here, a brief review of the relevant rate of return prescription is helpful. The Commission prescribed a rate of return of 12.75 percent for the initial monitoring period of October 1, 1985 through December 31, 1986.[6] Because the initial review period would be only 15 months rather than the two years of subsequent review periods, the Commission

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[1] The subject complaint was filed against The Mountain States Telephone and Telegraph Company (MTN), Northwestern Bell Telephone Company, Mountain States Telephone and Telegraph Company, and Pacific Northwest Bell Telephone Company have consolidated. 5 FCC Rcd 1982 (1990). U S West is the remaining company. At the time the complaint was filed, MTN, Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company were wholly-owned subsidiaries of U S West, Inc. (USWC). For purposes of this proceeding, we will use MTN for the defendant where appropriate.

[2] MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co., *et al.*, 5 FCC Rcd 216 (1990) (*MCI Liability Order*) , *recon. denied*, 5 FCC Rcd 3463 (1990) (*MCI Reconsideration Order*) (jointly "*MCI Orders*"), *appeal dismissed sub nom. Mountain States Tel. and Tel. Co., et al. v. FCC*, 951 F.2d 1259 (10th Cir. 1991) (per curiam); and *American Telephone and Telegraph Co. v. Northwestern Bell Telephone Co.*, 5 FCC Rcd 143 (1990), *appeal dismissed sub nom. Mountain States Tel. and Tel. Co., et al. v. FCC*, 951 F.2d 1259 (10th Cir. 1991).

[3] 47 U.S.C. § 201(b). This Section provides, in pertinent part, that "[a]ll charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful."

[4] MCI Telecommunications Corporation v. Pacific Bell Telephone Company, *et al.*, FCC 93-70 (released February 8, 1993) (*MCI Damages Order*).

[5] *MCI Liability Order*, 5 FCC Rcd at 217-218.

[6] *See* Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985) (*Phase I Order*), *on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,103 (Apr. 1, 1986) (*Phase I Reconsideration*), *on further reconsideration*, 2 FCC Rcd 190 (1987). *See also* Procedures and Methodologies to Establish Reporting Requirements, CC Docket No. 86-127, FCC 86-514 (released Dec. 3, 1986), 52 Fed. Reg. 273 (Jan. 5, 1987).

expanded the "buffer"[7] that would be used during this initial monitoring period to determine whether the prescription had been violated.[8] Carriers were given notice that a 13.10 percent level of earnings would be the maximum allowable rate of return on overall interstate earnings and 13.25 percent would be the maximum allowable return for any access service category.[9]

4. In September 1989, Com Systems filed the subject formal complaints[10] against the LECs alleging violation of the Commission's rate of return prescription. In addition, Com Systems reserved the right to file supplemental complaints for damages as provided for in Section 1.722 of the Commission's rules[11] because it could not determine the precise amount of damages it suffered at the time its complaints were filed. The defendants filed answers and MTN filed a motion to dismiss.[12] On June 9, 1992, the Common Carrier Bureau (Bureau) released an order establishing discovery and briefing schedules.[13] Pursuant to the *Discovery Order*, the parties submitted their initial briefs and reply briefs setting forth their respective claims and arguments.[14]

III. DISCUSSION

A. Liability For Damages

1. Contentions of the Parties

5. Com Systems alleges that the rates it paid for certain of the defendants' interstate access services during the period from October 1, 1985 through December 31, 1986 were unjust and unreasonable in violation of Section 201(b) of the Act. Com Systems supports its allegations with evidence taken from reports filed with the Commission by the defendants for the 15-month period at issue that show that defendants achieved earnings in excess of this Commission's prescribed rate of return on one or more of the three interstate access categories established for the purpose of enforcing that rate of return prescription.[15]

6. Com Systems requests that the Commission declare that the defendant LECs' charges for the period from October 1, 1985 through December 31, 1986 are in violation of the rate of return prescription and Section 201(b) of the Act, and order the defendant LECs to pay damages to Com Systems equal to the difference between the amount actually paid by Com Systems for interstate access service

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[7] *See MCI Liability Order*, 5 FCC Rcd at 217:

> ... the Commission established both an authorized rate of return and a 'spread' or 'buffer' above that return for use in proceedings relating to the enforcement of the prescription. In other words, the authorized return would be employed in computing tariff rates; the spread, or buffer, would be used in combination with the authorized return 'to determine whether a rate of return prescription had been violated.' [footnote omitted.]

[8] *Phase I Order*, 50 Fed. Reg. at 41,352 (para. 21).

[9] 47 C.F.R. § 65.701(b) (1990).

[10] Due to the similarity of the issues and arguments raised by the two defendants, the complaints have been consolidated for disposition. These complaints were held in abeyance by the Commission pending resolution of a court remand in *Illinois Bell Tel. Co. v. FCC*, 911 F.2d 776 (D.C. Cir. 1990). *See* Com Systems, Inc. v. Pacific Bell and The Mountain States Telephone and Telegraph Company, 6 FCC Rcd 648 (Com.Car.Bur. 1991) (*Abeyance Order*). Com Systems filed applications for review of the *Abeyance Order* on March 7, 1991. The defendants filed oppositions to the applications for review. Com Systems filed replies with unopposed motions for acceptance of late-filed pleadings. The Commission acted on the remand in October 1991. *See* Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, Decision on Remand, 7 FCC Rcd 296 (1991), *appeal docketed sub nom. Illinois Bell Telephone Co., et al. v. FCC*, No. 90-1020 (D.C. Cir. Jan. 11, 1991). On December 13, 1991, the Bureau released an order that reactivated the instant cases. *See* Order, 6 FCC Rcd 7296 (Com.Car.Bur. 1991). That action makes Com Systems' applications moot and, accordingly, we dismiss the applications.

[11] 47 C.F.R. § 1.722.

[12] Pacific Bell filed an answer, but did not file a motion to dismiss. Com Systems filed an unopposed motion to accept late-filed pleading with a reply to Pacific Bell's answer. In its motion, Com Systems established good cause for the late filing and, therefore, the motion is granted and the pleading accepted. On February 13, 1992, USWC filed a supplement to its motion to dismiss (USWC Supplement). Com Systems filed an opposition on February 25, 1992 and USWC replied on March 6, 1992. We will accept the USWC Supplement for filing since Com Systems has had opportunity to respond.

[13] Com Systems, Inc. v. Pacific Bell and The Mountain States Telephone and Telegraph Company, 7 FCC Rcd 3578 (Com.Car.Bur. 1992) (*Discovery Order*). Com Systems served interrogatories on the defendants on June 19, 1992. Pacific Bell responded on July 8, 1992 and USWC responded on July 13, 1992. USWC served interrogatories on Com Systems. The parties filed briefs on July 29, 1992 (Com Systems Br.; USWC Br.; Pacific Bell Br.). Com Systems filed its reply briefs on August 10, 1992 (Com Systems/Pacific Bell RBr.) (Com Systems/USWC RBr.). Pacific Bell filed its reply brief on August 10, 1992 (Pacific Bell RBr.) and USWC filed its reply brief on August 13, 1992 (USWC RBr.). Com Systems filed an unopposed motion for leave to file a supplemental damages calculation in the proceeding against Pacific Bell. We will grant the motion and accept the filing.

[14] As a preliminary matter, we note that USWC has stated that it filed its brief directly with the Commission because it could find no order delegating damages authority to the Bureau. In addition, USWC formally objects if the Bureau is deciding these cases under delegated authority because it contends that the Bureau has been performing investigative and prosecutorial functions in these proceedings and cannot, under Section 554(d) of the Administrative Procedure Act (5 U.S.C. § 554(d)), act as decision maker herein. USWC Br. at 2, n.7. While we agree with USWC that the damages issue must be decided by the Commission, 47 U.S.C. § 155(c)(1), the Bureau may deal with interlocutory matters such as discovery issues. We also disagree with USWC's characterization of the Bureau's activities regarding these complaint proceedings. The Bureau has at all times been acting as the "decision maker" and not as an "investigator" or "prosecutor."

[15] The interstate access service categories are special access, common line, and switched traffic sensitive. *See* 47 C.F.R. § 65.702 (1990). Com Systems states that the monitoring reports recite that for the period October 1, 1985 through December 31, 1986, Pacific Bell earned a return of 14.51% in the switched traffic sensitive category; MTN earned returns in the switched traffic sensitive category of 14.60% in Arizona.

during the period and the amount that Com Systems would have paid if the defendants' charges earned no more than the maximum allowable rate of return, plus interest.

7. The defendants raise a number of issues that have been fully considered by the Commission in the *MCI Orders*. They will be briefly discussed below.

8. Defendants advance a variety of arguments to support their claim that Com Systems has failed to state a cause of action under the Act. Primarily, the defendants argue that Com Systems' claims are barred by *American Telephone and Telegraph v. FCC*.[16] These arguments take on several forms. The defendants contend that renaming a "refund" as a "damage award" does not cure the inconsistencies the court found with respect to the automatic refund rule and allow the awarding of damages in the instant complaints.[17] The defendants argue that the Commission must consider underearnings in determining whether particular overearnings are in violation of the Act.[18] Finally, the defendants argue that it is contrary to *AT&T v. FCC* to find a rate of return violation when overall earnings for interstate access service did not exceed 13.10 percent regardless of access category earnings in excess of 13.25 percent.[19]

9. Defendants also argue that the Commission is engaging in retroactive ratemaking should it order a carrier to make refunds solely because the carrier has exceeded the authorized rate of return.[20] Additionally, Pacific Bell argues that the Commission's action in CC Docket No. 84-800 did not create a private cause of action that would permit an individual remedy.[21] MTN also argues that rates charged in conformity with a lawfully filed tariff cannot then be found to be unjust and unreasonable merely because they later proved to be too profitable.[22]

10. Each defendant argues that all of Com Systems' claims are barred by Section 415 of the Act, which establishes a two-year statute of limitations on the filing of complaints.[23] According to the defendants, Section 415 bars the recovery of any damages if sought more than two years after the occurrence of any overearnings, in this case, thus barring all recovery sought after December 31, 1988.[24]

11. Defendants also argue that the decision in *Ohio Bell*, issued after the release of the *MCI Liability Order*, requires dismissal of Com Systems' complaints.[25] According to the defendants, *Ohio Bell* reaffirms the proposition established in *AT&T v. FCC* that this Commission cannot award damages for carrier overearnings without allowing the carrier to re-coup or off-set underearnings.[26] Defendants contend that these propositions are not confined to the Commission's ratemaking activities under Sections 204-205 of the Act but are equally applicable when the Commission decides private complaints for damages under Section 208 of the Act.

12. In opposition to these arguments, Com Systems argues that the *Ohio Bell* decision is limited to the special access refund order at issue in that particular proceeding and that it has no controlling effect on this case.[27] Com Systems argues that the court confined its review of the Commission's justification for not considering underearnings, to the four corners of the order at issue. According

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[16] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court invalidated the Commission's procedure to enforce its rate of return prescriptions through automatic refunds of carrier overearnings to customers. For a detailed discussion of *AT&T v. FCC*, *see MCI Liability Order*, 5 FCC Rcd at 221-223. The U.S. Court of Appeals for the Sixth Circuit, relying on *AT&T v. FCC*, vacated a Commission order dealing with refunds of earnings in excess of the authorized rate of return for the special access category over a period of years in the context of a strategic pricing investigation. *See Ohio Bell Tel. Co. v. FCC*, 949 F.2d 864(6th Cir. 1991) (*Ohio Bell*). The court primarily relied upon the statement from *AT&T v. FCC* that a rate of return prescription is both a minimum and a maximum prescription. *See AT&T v. FCC*, 836 F.2d at 1390. The Commission has clarified, however, that it does not view a rate of return prescription as both a maximum and a minimum and has stated that

> [o]ur accumulated experience with rate of return prescriptions, and our review of the cost of capital evidence in this proceeding, convince us that there is no such point. * * * We believe there is a substantial gap between an earnings level that is fully adequate to assure attraction of capital on favorable terms, and an earnings level which, if sustained over time, would be confiscatory.

Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, 5 FCC Rcd 7507, 7532 (1990), *appeal docketed sub nom. Illinois Bell Telephone Co., et al. v. FCC*, No. 90-1020 (D.C. Cir. Jan. 11, 1991).

[17] *See* Pacific Bell Br. at 8; USWC Br. at 5.

[18] *See, e.g.*, MTN Answer, Affirmative Defenses and Motion to Dismiss at paras. 16-17.

[19] *See, e.g.*, Pacific Bell Br. at 6. Extending this argument even further, MTN contends that the key rate of return with which Com Systems should be concerned is the overall earnings of USWC in the aggregate, not the individual categorical earnings of USWC's subsidiaries. In the aggregate, USWC earned 12.73% overall. MTN Answer at para. 9.

[20] *See e.g.*, USWC Br. at 7. Pacific Bell argues specifically that under *Illinois Bell Tel. Co. v. FCC*, 966 F.2d 1478 (D.C. Cir. 1992) (*Illinois Bell*), a recent court decision, the Commission may only engage in prospective ratemaking when the investigative and accounting requirements of §204(a) have not been met. Pacific Bell Br. at 10-11. We reject defendant's claim that the decision in *Illinois Bell* somehow leaves this Commission only with Section 205 authority in the face of a violation of our rate of return prescription. As we explained in the *MCI Damages Order*, *Illinois Bell* addresses the Commission's authority under Section 204, not Section 208 and does not address the Commission's authority to award damages under § 208 for a violation of a valid rate of return of return prescription. *See MCI Damages Order* at para. 27.

[21] Pacific Bell Br. at 14-17.

[22] MTN Answer at para. 18.

[23] Section 415 provides, in pertinent part, that "[a]ll complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after...." 47 U.S.C. § 415(b). The term "overcharges" is defined in Section 415 "to mean charges for services in excess of those applicable thereto under the schedules of charges lawfully on file with the Commission." 47 U.S.C. § 415(g).

[24] *See* MTN Answer at para. 19; Pacific Bell Answer at para. 16.

[25] USWC Supplement at 2-3; Pacific Bell Br. at 6-8.

[26] Pacific Bell Br. at 7.

[27] Com Systems Opposition to Supplement to Motion to Dismiss at 3.

to Com Systems, there is no basis for interpreting *Ohio Bell* as a condemnation of proceedings in which a final order has yet to be issued.[28]

2. Discussion

13. We have carefully examined the record before us and conclude that the defendants, who were both defendants in the MCI complaint proceedings, have cited no facts and have made no arguments here that would warrant a ruling contrary to the *MCI Orders*.

14. *Failure to State a Cause of Action:* In the *MCI Liability Order*, we rejected identical claims made by the same defendants and held that *AT&T v. FCC* establishes no precedent that bars an individual complainant from seeking a remedy under Section 208 of the Act for damages based on a carrier's reported overearnings.[29] We stated that

> we are not persuaded by defendants' claims that earning in excess of a prescribed rate of return does not violate that Act or, if it does, that the Commission *is required* to take a carrier's underearnings as well as its overearnings into account in determining whether a violation has occurred.
>
> * * * * * * * *
>
> We find that a valid prescription bound the defendants to a maximum earnings limitation, and the defendants admit that they earned in excess of the amount during the period in question.[30]

We found further that *AT&T v. FCC* did not govern Section 208 complaint proceedings. The Commission has the authority to order a carrier to pay damages if a complainant meets the burden of establishing both a violation of the Act and the actual injury.[31]

15. *Retroactive Ratemaking:* In addition, we have previously held that enforcement of a rate of return prescription is not retroactive ratemaking because the obligation being enforced was set prospectively when the prescription was adopted.[32] Defendants have not persuaded us to alter our decision. We have also rejected the contention that rates charged in conformity with a lawfully filed tariff cannot be unjust and unreasonable.[33] We point out that the issue is not the lawfulness of high profits in the abstract, but the lawfulness of profits in excess of a prescription. Accordingly we hold that, taking into account the buffer, profits in excess of a prescription are unjust and unreasonable.

16. *Statute of Limitations:* Com Systems is correct in its assertion that it had until September 30, 1989 to file its complaints based on monitoring reports filed by defendants with the Commission on September 30, 1987.[34] We have previously held that the date of the filing of the final monitoring report is dispositive with regard to the date a complainant discovers the right or wrong or the facts on which such knowledge is chargeable as a matter of law.[35] Defendants have made no argument that persuades us to alter this holding. Section 415 does not bar Com Systems' complaints.

17. *Ohio Bell:* We disagree with the defendants' claim that *Ohio Bell* and *AT&T v. FCC* compel us to dismiss Com Systems' complaints. As we emphasized in the *MCI Liability Order* and reaffirmed in the *MCI Damages Order*, automatic refunds and refunds ordered under Section 204 of the Act are different from individual actions for damages under Section 208. Unlike the automatic refund mechanism in *AT&T v. FCC* or the refund procedure in *Ohio Bell*, both of which resulted from rulemaking proceedings initiated at the Commission's discretion, individual actions for damages under Section 208 are initiated by private parties seeking damages for injuries to themselves; those private parties have the burden of establishing both a violation of the Act and actual injury.[36] The courts in *AT&T v. FCC* and *Ohio Bell* did not discuss private complaints for damages; they did not invalidate private actions for damages; and their holdings are not applicable to the different separately authorized complaint procedure set forth in Sections 206-209. Accordingly, those decisions do not require us to depart from our holding in the *MCI Liability Order* that defendants have violated the Communications Act by earning in excess of a valid rate of return prescription, thereby making their rates unjust and unreasonable under Section 201 of the Communications Act and themselves liable for damages to the extent a complainant/customer can establish that it was damaged as a result of the violation.[37]

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[28] *Id.* at 2-3.

[29] *MCI Liability Order*, 5 FCC Rcd at 222-23.

[30] *MCI Liability Order*, 5 FCC Rcd at 223 [emphasis in the original].

[31] *Id.*

[32] *Id.* at 222.

[33] *Id.*

[34] Com Systems cites to the Bureau's Show Cause Orders in both the AT&T and MCI proceedings to support its argument. *See, e.g.*, MCI Telecommunications Corp. v. Pacific Bell, *Order to Show Cause*, 4 FCC Rcd 6116, 6118, n.9. This holding was subsequently adopted by the Commission. *See MCI Liability Order*, 5 FCC Rcd at 224-25.

[35] In the *MCI Liability Order* we stated:

> the defendants filed the rate of return monitoring reports which...were developed by the Commission for several purposes, including making information about carrier earnings public[ly] available. Moreover, the monitoring reports relied on by MCI in its complaints were specifically designated by the Commission as a "final" and conclusively binding determination of a carrier's earnings.

5 FCC Rcd at 225. We note further that, we have held that Section 415(e) is inapplicable to the type of complaints we deal with here. Section 415(e) concerns a carrier's liability to its customers for failure to transmit a message in accordance with its common carrier obligations. The instant complaints deal with the lawfulness of defendants' rates, not defendants' transmissions or obligations to transmit messages properly. *See MCI Reconsideration Order*, 5 FCC Rcd at 3464.

[36] *See MCI Liability Order*, 5 FCC Rcd at 222-23, para. 55.

[37] *Id.* at 226, para. 86.

B. Damages and Interest Claims

18. Com Systems' damages claims rest primarily on the contention that the proper measure of damages it incurred as a result of the defendants' rate of return prescription violations is the difference between the amount it actually paid the defendants for interstate access services during the October 1, 1985 through December 31, 1986 monitoring period and the amount it would have paid if the defendants' rates produced earnings that did not exceed the Commission's prescription. The defendants, however, have raised a number of challenges to Com Systems' damages claims, including a number of arguments that were previously considered and rejected by the Commission in the *MCI Liability Order* and the *MCI Damages Order*.[38] We address the parties' contentions below.

1. Damages

a. Contentions of the Parties

19. As referenced above, Com Systems' damages claims rest primarily on the contention that the proper measure of the damages it incurred as a result of defendants' violations is the difference between the amount it actually paid defendants for interstate access services during the October 1, 1985 through December 31, 1986 period and the amount it would have paid if the defendants' rates had produced earnings that did not exceed the Commission's prescribed rate of return. In the *Discovery Order*, the Bureau stated that it tended to agree, in principle, that a possible measure of the damages stemming from defendants' rate of return violations could be that difference.[39] The Bureau was not persuaded on the record before it, however, that a damages determination based solely on such a measure necessarily reflected actual damages incurred by Com Systems.[40] The defendants were invited to submit evidence that could serve to mitigate or otherwise reduce Com Systems' damages claims. Specifically, the Bureau stated that evidence demonstrating that Com Systems' share of excessive earnings realized in a particular access category by a defendant could be offset or otherwise reduced due to facts and circumstances surrounding Com Systems' purchase of other interstate access services from such defendant for the relevant monitoring period might be relevant.[41]

20. Com Systems contends that it should be awarded damages of $175,327 from Pacific Bell[42] and $14,453 from MTN, including interest.[43] Com Systems states that the data underlying these calculations was taken from defendants' Forms 492, defendants' responses to discovery, and from Com Systems' own records.[44] To derive the stated amounts, Com Systems first calculated, for each study area and access service category in which a defendant's earnings exceeded the rate of return prescription of 12.75% plus .50% buffer, the maximum allowable category earnings by multiplying the rate base by the maximum allowable category rate of return over the period reflected in the Monitoring Report. Com Systems then subtracted this amount from the category operating income shown on the Monitoring Report to determine the after-tax overearnings. To determine the pre-tax overearnings, Com Systems divided the after-tax overearnings by "1" minus the defendants' effective tax rate. Com Systems then calculated its base damage award by multiplying defendants' pre-tax overearnings by Com Systems' percentage of overcharges, determined by dividing complainant's access category purchases by the total access category revenues.[45] Com Systems also claims interest calculated at the maximum allowable rate of return for the monitoring period compounded daily.[46]

21. The defendants challenge Com Systems' damages claims on a number of grounds, raising several arguments that were previously considered and rejected by the Commission in the *MCI Liability Order* and the *MCI Damages Order*. Defendants contend that by simply basing its damages claims on a calculation of Com Systems' prorated share of category-level overearnings, Com Systems asks the Commission to award it damages in the same amounts it would have received under the automatic refund rule invalidated by the court in *AT&T v. FCC*.[47] The defendants maintain that such a result is expressly precluded by *AT&T v. FCC*. The defendants add that the decision in *Ohio Bell* precludes an award of damages based solely on category level overearnings.

22. Defendants next contend that, even if *AT&T v. FCC* and *Ohio Bell* do not preclude Com Systems' damages claims, the claims still fail because Com Systems' complaints do not establish a valid cause of action. According to defendants, to pursue a damages claim, Com Systems must first show that the defendants charged unjust and unreasonable rates for interstate access services during the period in question, not that defendants' rates produced excessive returns in individual service categories.[48]

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[38] The issues and arguments raised by Pacific Bell and MTN in response to Com Systems' claims are essentially identical. For the sake of convenience and clarity, we will refer to defendants' arguments as if they are part of the same pleading. To the extent that the defendants raise separate or unique arguments, we will address them separately.

[39] *Discovery Order*, 7 FCC Rcd at 3582, para. 6.

[40] *Id.*

[41] *Id.*

[42] In its Brief, Com Systems stated that it would file a supplemental calculation of damages based on overearnings in the special access category. On October 21, 1992, Com Systems filed a supplemental calculation of damages for its switched traffic sensitive claim. However, no supplemental damages claim has been filed based on special access overearnings. We have no basis upon which to award damages to Com Systems for overearnings in the special access category. Accordingly, Com Systems' damages claims against Pacific Bell will be limited to overearnings in the switched traffic sensitive category.

[43] These amounts include interest on base claims of $83,677 from Pacific Bell and $7,555 from MTN calculated through July 31, 1992.

[44] *See* Com Systems Br. at 30-31. According to Com Systems, all of the data are included in the record of these proceedings.

[45] *Id.* at 31-32.

[46] *Id.* at 32.

[47] USWC Br. at 4-6. In addition, defendants contend that *Ohio Bell* clearly determines that it was the end result of the automatic refund mechanism, not the mechanism itself, that was unlawful. Pacific Bell Br. at 7.

[48] USWC argues that Com Systems must specify an identifiable rate that it paid that was too high or too low. USWC Br. at 11. In addition, USWC cites to a 1970 circuit court decision to support its claim that where retroactive relief is ordered for rates paid pursuant to a tariff that is subsequently found unjust and unreasonable, the Commission must determine what a just and reasonable rate is. *Id.*, citing to *Middlewest Motor Freight Bureau v. United States*, 433 F.2d 212, 232 (8th Cir. 1970)

Moreover, defendants argue that Section 206 of the Act[49] requires Com Systems to prove injury, causation, and the amount of damages in addition to establishing a violation of the Act.[50] Defendants maintain that by simply referencing defendants' earned rates of return for individual access service categories, Com Systems has not only failed to allege any facts that would establish that defendants' rates were unjust and unreasonable during the period in question but has also failed to show that it sustained actual damage as a result of those rates.[51]

23. The defendants each raise distinct arguments to support their claims that an award of damages to Com Systems based on carrier overearnings is inappropriate for equitable and policy reasons. MTN vigorously argues that Com Systems is actually seeking restitution or a refund of tariffed charges, not damages. MTN argues that regardless of how Com Systems characterizes the relief it seeks, any form of refund or restitution to Com Systems would be contrary to the public interest.[52] MTN further contends that an award of damages would be inequitable because (i) USWC's total corporate rate of return would be driven below the confiscatory level; (ii) there was uncertainty surrounding the tariff filings during the relevant period; and (iii) Com Systems would receive a windfall that would be inconsistent with sound equitable principles.[53]

24. For its part, Pacific Bell argues that Com Systems' claim for damages is flawed because Com Systems simply assumes that lower rates would have produced lower earnings and offers no probative evidence to show what a reasonable rate would have been or to otherwise support its damages claims.[54] Pacific Bell argues, as does MTN, that Com Systems would receive a windfall if it has passed the "overcharges" on to its customers and is now awarded damages.[55] Pacific Bell argues that had its access charges to Com Systems been lower in 1985-1986, it is almost certain that Com Systems' rates to its customers would have been lower.[56] Pacific Bell cautions the Commission to look at the "backdrop of the practical consequences" and ensure that any decision granting Com Systems "refunds" is equitable under the circumstances.[57] Pacific Bell further argues that, should the Commission award damages to Com Systems, the Commission should order Com Systems to pass the damages through to its end users in the form of a rate reduction.[58]

25. Finally, Pacific Bell argues that any award of damages to Com Systems based on overearnings should be reduced by Pacific Bell's underearnings in the common line category (earnings under 12.75%).[59] Taking these factors into consideration, Pacific Bell claims that Com Systems was at most overcharged $15,000.

26. Com Systems counters that defendants' threshold arguments regarding the effect of the court's ruling in *AT&T v. FCC* have largely been rejected or precluded by the *MCI Liability Order*.[60] Com Systems states that defendants' arguments that it has failed to allege and prove violations of the Act and actual damage are unfounded because it has made a sufficient showing of each under traditional principles governing its statutory right to such relief. According to Com Systems, the only injury and causation it need show are the injury and causation arising from its payment of excessive rates for services it purchased from defendants during the relevant period. Com Systems maintains that it has shown that defendants charged it rates

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(*Middlewest*), *cert. denied*, 402 U.S. 999 (1971). As we determined in the *MCI Damages Order*, USWC's reliance on *Middlewest* is misplaced. *MCI Damages Order* at n.56.

[49] *See* 47 U.S.C. § 206.

[50] Pacific Bell Br. at 17.

[51] *See, e.g.*, Pacific Bell Br. at 17-18; USWC Br. at 12. USWC contends that the principle that Com Systems must still prove it was damaged and in what amount was established by the Supreme Court in *Southern Ry. Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 454-55 (1979) (*Seaboard*), in construing relevant sections of the Interstate Commerce Act. The Court stated:

> [O]ur sole concern is the Commission's decision not to investigate under § 15(8)(a) [204], a decision that has only two final consequences. First, the burden of proof with regard to *reasonableness* is placed on the shipper under § 13(1) [208] rather than on the carrier, who would have borne it in a § 15(8)(a) [204] proceeding. (With respect to all other aspects of lawfulness, however, the burden is borne by the shipper in both proceedings. Second, the shipper's relief, if unlawfulness is proved, is limited under § 13(1) [208] to actual damages rather than the full refund of overcharges available under § 15(8)(a) [204].

USWC states that this ruling has been found applicable to proceedings under the Communications Act. *See Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221, 1235 n.35 (D.C. Cir. 1980) (*ARINC*), *cert. denied*, 451 U.S. 920 (1981). Here too, as we determined in the *MCI Damages Order*, USWC's reliance on case precedent is misplaced. *MCI Damages Order* at n.59.

[52] USWC Br. at 13-19. USWC argues Com Systems must plead its case in equity and the Commission may only award a refund/damages if we find that the public interest will be served by a refund/damages award to Com Systems. USWC contends that the leading case in this area is *Moss v. Civil Aeronautics Board*, 521 F.2d 298 (D.C. Cir. 1975) (*Moss*), *cert. denied sub nom. Roberts v. Civil Aeronautics Board*, 424 U.S. 966 (1976), *reh'g denied*, 425 U.S. 966 (1976). USWC states that the refund in *Moss* "was governed by the equitable principles governing the law of restitution." USWC Br. at 14, citing to *Moss*, 521 F.2d at 304. We addressed this argument in the *MCI Damages Order* and found USWC's reliance on *Moss* to be misplaced. *MCI Damages Order* at n.60.

[53] USWC Br. at 17-19.

[54] Pacific Bell Br. at 14.

[55] *See, e.g., id.* at 18.

[56] *Id.* at 19. Pacific Bell cites to numerous newspaper and magazine articles to support this contention.

[57] *Id.* at 20 citing to *Las Cruces TV Cable v. FCC*, 645 F.2d 1041 (D.C. Cir. 1981) (*Las Cruces*). In *Las Cruces*, the court upheld, in part, and remanded, in part, a Commission decision requiring refunds under Section 204 of the Act. The court noted that *Las Cruces*

> is the first time that the Federal Communications Commission has attempted to articulate standards governing its award of refunds to customers of a communications common carrier under Section 204 of the Act.

645 F.2d at 1046. Pacific Bell's reliance on *Las Cruces* is unavailing, however, because equitable considerations that may impact a Section 204 investigation are not applicable in individual Section 208 complaint proceedings.

[58] Pacific Bell Br. at 20-21.

[59] *Id.* at 21-22.

[60] Com Systems RBr. at 3-5.

that produced earnings in excess of the Commission's prescribed rate of return and argues that its damages are the excessive charges that Com Systems paid.[61]

27. Com Systems also contends that the so-called similarities between its damages requests and the automatic refund do not transform the private complaint remedy into a public enforcement refund remedy as alleged by the defendants. According to Com Systems, under the complaint process, a complainant must prove that it was a purchaser from the defendant in order to be entitled to damages, whereas under the automatic refund rule, complainant would have been automatically entitled to a refund.[62] Com Systems argues that the statutory complaint remedy preceded the automatic refund rule and thus survives the invalidation of that rule.[63]

28. Com Systems next argues that defendants' offset arguments should be rejected because the Commission cannot retroactively repeal the category rate of return prescription. Such a repeal would, according to Com Systems, defeat the key purpose of the rate of return prescription: protecting ratepayers from discriminatory and anticompetitive LEC conduct. Com Systems does not dispute that Pacific Bell should be given credit for its claimed partial refund of excess switched traffic sensitive charges in 1988.[64]

29. Finally, Com Systems argues that unlike Section 204 of the Act,[65] which grants the Commission discretionary authority to weigh equitable considerations, Section 206 of the Act[66] imposes upon the Commission an absolute duty to award full damages and defendants' offsets arguments should therefore be rejected. Com Systems contends that, even if taken into account, any equitable considerations weigh in its favor rather than in the favor of the defendants.[67] According to Com Systems, by establishing a rate of return prescription that balanced shareholder and ratepayer interests, the Commission did all that was necessary in "balancing the equities."[68]

b. Discussion

30. *AT&T v. FCC and Ohio Bell:* The defendants' claims that the holdings in *AT&T v. FCC* and *Ohio Bell* control these proceedings and bar an award of damages to Com Systems are without merit for the reasons stated in both the *MCI Liability Order* and the *MCI Damages Order*. In the liability section above, we again emphasized that the court in *AT&T v. FCC* explicitly acknowledged this Commission's authority to order a carrier to disgorge earnings in excess of a rate of return prescription,[69] finding only the remedy component of the Commission's rate of return prescription (the automatic refund mechanism) to be unlawful.[70] More to the point, we emphasized that "the [*AT&T v. FCC*] opinion does not address Section 208 complaint proceedings nor purport to alter the statutory scheme of the Act or the remedies Congress established therein."[71] Similarly, as we stated in the *MCI Damages Order*, the *Ohio Bell* decision does not expand upon *AT&T v. FCC* and does not address this Commission's authority to award damages in private complaint actions under Section 208 of the Act.[72]

31. *Section 201(b) of the Act:* We turn now to the defendants' contention that Com Systems' damages claims must be dismissed because Com Systems has failed to prove defendants' rates were unjust and unreasonable within the meaning of Section 201(b) of the Act. In the liability section above, we held that the complainant met its burden of proof by establishing that the defendants violated our rate of return prescription.[73] Accordingly, the question before us now is not whether defendants' rates were unjust and unreasonable; rather the questions now are whether the complainant suffered any measurable damage as a consequence of paying rates previously determined by the Commission to be unlawful under Section 201(b).

32. The defendants next claim, that even if Com Systems has sustained its burden and shown that defendants' rates were unjust and unreasonable, its damages claims must still fail because judicial precedent compels Com Systems to establish what a just and reasonable rate would have been as a prerequisite to pursuing damages claims based on unreasonable rates,[74] has previously been discussed and rejected by this Commission. In the *MCI Damages Order* we reemphasized[75] the Commission's authority to prescribe and enforce carriers' rates of return, pointed out that the issue in these proceedings is not whether individual rates are unlawful, but whether cumulative rates that produced earnings over and above a prescribed rate of return are unjust and unreasonable, and agreed with the Bureau's determination in the *Discovery Order* that a proper starting point for assessing damages based on violations of a rate of return prescription is to look at the difference between the amount complainant paid for defendants' interstate access services and the amount it would have paid if defendants had charged rates that produced returns within the Commission's prescribed levels.[76] We said, "[i]t is appropriate and consistent with the Commission's rate of return regulatory scheme to inquire as to earnings in excess of prescribed levels for purposes of assessing damages claims."[77] Com Systems has shown that it purchased services from defendants at rates that produced earnings over and above the defendants' prescribed levels. We previously deter-

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61 *Id.* at 7-8.
62 *Id.* at 10.
63 *Id.* at 8.
64 Com Systems/Pacific Bell RBr. at 6, n.14.
65 47 U.S.C. § 204(a)(1).
66 47 U.S.C. § 206.
67 Com Systems RBr. at 13-14.I
68 *Id.* at 15-16.
69 *AT&T v. FCC*, 836 F.2d at 1392 ("Thus, as we previously have concluded, the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate of return prescription.").
70 Indeed, the court in *Ohio Bell* recognized the continuing efficacy of our rate of return framework. *See* 949 F.2d at 868.
71 *MCI Liability Order*, 5 FCC Rcd at 223, para. 56.
72 *MCI Damages Order* at para. 26.
73 In the *MCI Liability Order*, we held that the complainant therein could prove that defendants' rates were unjust and unreasonable by proving that the defendants violated our rate of return prescription. *See MCI Liability Order*, 5 FCC Rcd at 226.
74 USWC Br. at 11, citing *Middlewest*, 433 F.2d 212, 232.
75 For a full discussion of the Commission's authority to prescribe and enforce carriers' rates of return, *see MCI Liability Order*, 5 FCC Rcd 222-23.
76 *MCI Damages Order* at para. 29.
77 *Id.*

mined in the *MCI Liability Order* that a violation of such a prescription constitutes a violation of the Act for which damages may lie.

33. *Damages and Offsets:* The defendants' arguments are devoted primarily to attempting to persuade the Commission that Com Systems' damages claims are really claims for restitution or refunds governed by equitable or public policy considerations. These considerations, according to defendants, militate against any award of damages to Com Systems based on excessive earnings. The defendants argue, in effect, that the damages Com Systems seeks are equivalent to refunds that would have been required under the refund mechanism invalidated by the court in *AT&T v. FCC*. We do not agree. We are concerned here with determining whether a particular customer, which has availed itself of a statutory complaint remedy under Title II of the Act, has sustained any measurable damage that can be traced to defendants' violations of the Act. Although a damages award under Section 208 of the Act might well be equal or substantially similar to a refund ordered under Section 204 of the Act,[78] this does not transform a private complaint action into a public enforcement proceeding subject to broad public interest considerations.

34. As in the *MCI Damages Order*, we find defendants' arguments with respect to "passing-on" equally unavailing. In rejecting this same argument, we said, "[w]hether [complainant] passed on the overcharges or absorbed them does not alter the fact that the defendants overcharged [complainant] in violation of a binding rate of return prescription and must answer for such violations."[79] The issue is not what Com Systems has done in response to paying excessive rates, but whether Com Systems has been damaged as a result of these excessive rates.[80]

35. Nor can we accept the defendants' related claim that we should require Com Systems to flow through any damages it may receive to its end user customers. Sections 206-209 of the Act give private parties the right to file complaints challenging the acts or omissions of carriers and to recover monetary damages resulting from such acts or omissions. Complainants, however, are charged, as Com Systems is in the instant case, with the burden of establishing violations of the Act or Commission rule or order and the amount or extent of damage suffered as a consequence of such violations. Accepting defendants' flow through argument would, in effect, transform Com Systems' complaints into class action suits on behalf of its customers, a result neither expressly contemplated by nor consistent with the private remedy created under Sections 206-209 of the Act.

36. In addition, we reject MTN's contention that a damages award to Com Systems is precluded because it would drive USWC's overall rate of return for USWC in the aggregate below the minimum necessary to raise capital to confiscatory levels. Assuming *arguendo*, that such an inquiry is relevant to a Section 208 damages claim, USWC has failed to provide sufficient record evidence for this Commission to assess the impact of any damages award upon its overall interstate rate of return. While MTN has provided some data in Exhibit A to its brief,[81] these data made no clear showing of the amount by which an award to Com Systems would reduce USWC's overall interstate earnings or rate of return let alone that any such reduction would be confiscatory. For the reasons stated in the *MCI Damages Order*,[82] we find MTN's other equitable arguments regarding the uncertainty surrounding tariff filings during the 1985-86 period and an alleged windfall to Com Systems should it receive restitution equally unavailing.

37. We also reject Com Systems' claim that the allowance of offsets would somehow repeal our rate of return prescription on a category basis. The issue of damages to a particular complainant is separate and apart from the validity and effect of our rate of return prescription. The determination we make here is the extent to which complainant suffered damage on account of defendants' violations of the rate of return prescription. The question of offsets is relevant to that determination and no other.

38. Pacific Bell does, however, raise factors which it believes warrant an offset against Com Systems' damages claims. Pacific Bell states that it underearned on its common line services during the period in question and that Com Systems' prorated share of those underearnings is approximately $56,000. Pacific Bell argues that taking into account its underearnings, a net overcharge to Com Systems of approximately $15,000, based on the measure of damages advocated by Com Systems, results.[83]

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[78] *See Seaboard*, 442 U.S. 444, 455, n.8:

> If a shipper proves a rate is unreasonable and that he was damaged in the full amount he was overcharged, the outcome of a § 13(1) [§ 208] proceeding will be no different than that of a § 15(8)(a) [§ 204] proceeding in which the carrier fails to establish the reasonableness of the rate.

[79] *MCI Damages Order* at para. 31.

[80] While defendants have asserted that lower charges to complainant would have resulted in lower charges to complainant's customers, they have provided no persuasive evidence in support of this contention. Pacific Bell, for example, relies solely on press clippings that purportedly show that Com Systems' rates to its customers would have been affected by changes in defendants' rates. Pacific Bell Br. at 19-20. These clippings do not, however, establish, as a matter of law, that complainant, in fact, passed on defendants' overcharges to its customers.

[81] Exhibit A contains a summary and compilation of information submitted in MTN's Form 492 for the relevant monitoring period, a calculation of how much money USWC would have earned if its entire carrier enterprise earned exactly at a 12.75% rate of return, and the same calculation at a 13.10% rate of return.

[82] *MCI Damages Order* at para. 32.

[83] We note that Com Systems filed a supplemental calculation of damages stating that Pacific Bell should pay damages in the base amount of $83,677 after deleting the $26,000 refunded to Com Systems in 1988. Pacific Bell contends that the amount in question is approximately $72,000 before offsets. The difference of over $11,000 appears to be primarily the result of Com Systems using 13.10% as the rate of return for measuring category overearnings when the defendant's overall rate of return

39. MTN also provides specific calculations for offsets in its reply brief.[84] MTN states that Com Systems' base damage award from MTN should be reduced by approximately $3,188 to take into account underearnings from Colorado in the switched traffic sensitive category.[85]

40. We have carefully reviewed the arguments and evidence presented by the parties and believe that some offset to the claimed damages amounts is appropriate. In the *MCI Liability Order*, we specifically rejected claims by the defendants that the Commission is required to take a carrier's interstate access underearnings as well as overearnings into account in determining whether a violation of the Act has occurred because this would be at odds with established case law.[86] However, we stated in the *MCI Damages Order* that it is appropriate to consider defendants' underearnings in assessing complainant's damage, or injury, resulting from defendants' overearnings in a particular monitoring period[87] and rejected the complainant's contention that this approach results in unlawful cross-subsidization.[88] The parties have made no argument which persuades us to alter our holdings.

41. We award damages to Com Systems from Pacific Bell in the amount of $17,309.[89] In reaching this amount, we have adjusted Com Systems' calculation of Pacific Bell's overearnings at a rate of return of 13.25% rather than 13.10% for the switched traffic sensitive category. We have also allowed the offset of undercharges in the common line category in the amount of $56,000 and agree with the parties that it is appropriate to deduct the $26,000 refunded by Pacific Bell in 1988.

42. We award damages to Com Systems from MTN in the amount of $6,780. In reaching this amount, we have adjusted Com Systems' calculation of MTN's overearnings in New Mexico at a rate of return of 13.25% rather than 13.10% for the switched traffic sensitive category. We are not allowing MTN an offset for underearnings in Colorado because MTN calculated that offset using 13.25% as a rate of return rather than 12.75% and a switched traffic rate base that included disallowed items.[90] When these errors are corrected, MTN did not overearn in Colorado.[91]

2. Interest on Damages Awards

a. Contentions of the Parties

43. Defendants' final claim is that Com Systems is not entitled to prejudgment interest should the Commission award damages to Com Systems. Pacific Bell grounds its claim on its contention that the amount of damages has been sharply disputed in these proceedings.[92] Pacific Bell claims that interest would penalize it even though it has not been accused of deliberate wrongdoing and that interest is not necessary to make Com Systems whole. MTN simply contends that while the Commission may award interest under Section 204 of the Act, there is no provision for the award of interest under Section 206 of the Act. Because we cannot lawfully grant Com Systems a refund, MTN argues, we may not award interest.[93]

44. Com Systems disputes defendants' claims that it is not entitled to prejudgment interest in connection with any ultimate damages award. Com Systems contends that an award of prejudgment interest is appropriate in the instant case because defendants could ascertain with sufficient certainty the amount of Com Systems' damages. Com Systems also argues that an award of interest is required to effectuate the purposes of the Commission's complaint remedy.[94]

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exceeded the Commission's prescribed amount. There is no basis for Com Systems' assertion and we will use our own calculation of their base damage amount using 13.25%

[84] In addition, USWC contends that Com Systems' overearnings are overstated because Com Systems improperly used 13.10% to calculate category overearnings in states which also had overall earnings in excess of the Commission's prescribed rate of return.

[85] USWC also contends that all of Com Systems' claim is overstated because Information and Intercept elements were excluded from MTN's rate base when filed on MTN's Form 492.

[86] *MCI Liability Order*, 5 FCC Rcd at 223, paras. 59-60, citing *Nader v. FCC*, 520 F.2d 182, 201 (D.C. Cir. 1975). *See also New England Tel. & Tel. Co. v. FCC*, 826 F.2d 1101 (D.C. Cir. 1987), *cert denied*, 109 S.Ct. 1942 (1989); and *AT&T v. FCC*.

[87] *MCI Damages Order* at para. 38.

[88] *Id.* at para. 39.

[89] As explained in para. 40, this amount is calculated as follows:

$ 99,309 (overcharges)

- 56,000 (undercharges - common line category)

- 26,000 (amount refunded by Pacific Bell)

$ 17,309 Damages

[90] We reject USWC's argument that Information and Intercept elements should be included in the calculation of MTN's rate of return in the switched traffic sensitive category. These items were not included by state on MTN's Forms 492 and we will not allow adjustments to be made to those reported figures. As we discussed in the *MCI Liability Order*, the Forms 492 are final reports and carriers may rely upon them. *MCI Liability Order*, 5 FCC Rcd at 225, para. 78. We also reject USWC's contention that the Commission's rate base formula disallows items that should be included, thus overstating MTN's actual rate of return. USWC's argument is an impermissible collateral attack on a prior Commission decision. *See* Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, 7 FCC Rcd 296 (1991), *appeal docketed sub nom. Illinois Bell Telephone Co., et al. v. FCC*, No. 90-1020 (D.C. Cir. Jan.11, 1991).

[91] MTN earned $38,996,000 in the switched traffic sensitive category in Colorado. Using the target category rate of return of 12.75%, MTN's target earnings were $37,701,113 in this category. MTN cannot be said to have underearned in the switched traffic sensitive category when its earnings exceeded the target earning level.

[92] *See, e.g.*, Pacific Bell Br. at 24.

[93] USWC Br. at 12-13.

[94] Com Systems/USWC RBr. at 24-28.

b. Discussion

45. USWC's claim that the Commission lacks the requisite authority to award interest in a Section 208 common carrier complaint proceeding has no merit. Although an award of interest does not fall squarely within the ambit of Section 208 of the Communications Act, our authority under Sections 4(i) and other sections of the Act to award interest in a common carrier complaint case is well established.[95] In deciding whether to award interest in a particular common carrier complaint case we are generally guided by federal court practice, where the award of prejudgment interest "... is a matter left to the sound discretion of the trial court."[96] The award of interest in a common carrier complaint case is thus guided by considerations of fairness. Applying this standard, we are persuaded that an award of interest is appropriate in these cases. Com Systems was effectively deprived of the use of the excessive amounts it paid defendants as a result of defendants' unlawful rates while defendants, on the other hand, enjoyed the beneficial use for a substantial period of time of funds to which Com Systems rightfully has a claim. We are persuaded that interest is required not only to effect a full and fair remedy for Com Systems, which paid rates higher than it would have paid had defendants earned within the prescribed level, but also to avoid any unjust enrichment of defendants stemming from their charging rates that we have determined to be unjust and unreasonable under Section 201(b) of the Act.[97] We conclude that interest should be computed at the IRS rate for tax refunds.[98] In addition, we find that interest should begin to accrue from January 1, 1987, the day after which the 1985-1986 monitoring period ended. At that point, defendants were subject to the earnings limitations of a new monitoring period. Accordingly, we award interest calculated at the IRS rate for tax refunds[99] from defendants to Com Systems from January 1, 1987 until the date of full payment to Com Systems.

IV. CONCLUSION

46. We have carefully reviewed the extensive record before us and have found, to the extent indicated here, that complainant is entitled to an award of damages, plus accumulated interest on such damages, for Pacific Bell Telephone Company's and The Mountain States Telephone and Telegraph Company's violations of our rate of return prescription for the 1985-1986 monitoring period.

V. ORDERING CLAUSES

47. Accordingly, IT IS ORDERED, pursuant to Section 4(i), 4(j), 201, 206, 207, 208 and 209 of the Communications Act, as amended, 47 U.S.C. §§ 4(i), 4(j), 201, 206, 207, 208 and 209, that the above-captioned complaints filed by Com Systems, Inc. ARE GRANTED to the extent discussed here.

48. IT IS FURTHER ORDERED that Pacific Bell Telephone Company SHALL PAY to Com Systems, Inc. the sum of $17,309 (seventeen thousand, three hundred and nine dollars) within 60 days after the release date of this Memorandum Opinion and Order; and that The Mountain States Telephone and Telegraph Company SHALL PAY to Com Systems, Inc. the sum of $6,780 (six thousand, seven hundred and eighty dollars) within 60 days after the release date of this Memorandum Opinion and Order.

49. IT IS FURTHER ORDERED that Pacific Bell Telephone Company and Mountain States Telephone and Telegraph Company SHALL PAY Com Systems, Inc. interest on the amount of damages assessed, using applicable IRS rates on within 60 days after the release date of this Memorandum Opinion and Order.

50. IT IS FURTHER ORDERED that the Motions To Accept Late-Filed Pleadings filed by Com Systems, Inc. on December 7, 1989 and April 5, 1991 ARE GRANTED.

51. IT IS FURTHER ORDERED that the Supplement to Motion to Dismiss filed by The Mountain States Telephone and Telegraph Company on February 13, 1992 IS ACCEPTED for filing.

52. IT IS FURTHER ORDERED that the Motion for Leave to File Supplemental Damages Calculation filed by Com Systems, Inc. on October 21, 1992 IS GRANTED.

53. IT IS FURTHER ORDERED that the Applications for Review filed on March 7, 1991 by Com Systems, Inc. ARE DISMISSED.

54. IT IS FURTHER ORDERED that the Motion to Dismiss filed by The Mountain States Telephone and Telegraph Company on December 11, 1989 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[95] *See* MCI Telecommunications Corporation v. American Telephone and Telegraph Company, *et al.*, 94 FCC 2d 332, 343-46 (1983).

[96] *United States v. California Board of Equ a lization*, 650 F.2d 1127, 1132 (9th Cir. 1981), *aff'd*, 456 U.S. 901 (1982), *reh'g denied*, 456 U.S. 985 (1982).

[97] *See New England Tel. & Tel. Co. v. FCC*, 826 F.2d 1101, 1113 (D.C. Cir. 1987), *cert. denied*, 109 S. Ct. 1942 (1989) (carriers may reasonably be required "to pay full interest for earnings they had no right to retain in the first place.").

[98] We believe that the rationale adopted by the Commission for applying the IRS rate in pole attachment complaint proceedings under Section 204 of the Act, 47 U.S.C. § 204, is equally applicable here. In Teleprompter of Fairmont v. C&P of West Virginia, 79 FCC 2d 232 (1980), the Commission stated

> As a matter of fairness, we believe that the rate of interest applied in a pole attachment complaint proceeding should be readily available, easily applied, and periodically revised to reflect changes in borrowing costs. In light of these considerations, we find the interest rate for federal tax refunds and additional tax payments suitable for use in this type of proceeding. This rate appears in a variety of easily obtained official and commercial publications, and is revised on a regular basis. [Footnote omitted.]

79 FCC 2d at 238.

[99] The applicable IRS rates are set forth in Appendix A.

APPENDIX A

Effective Period	Rate	Internal Revenue Service Citation
01/01/87 - 03/31/87	8%	Rev.Rul. 146, 1986-2 C.B. 208
04/01/87 - 06/30/87	8%	Rev.Rul. 87-23, 1987-13 I.R.B. 46
07/01/87 - 09/30/87	8%	Rev.Rul. 87-62, 1987-29 I.R.B. 10
10/01/87 - 12/31/87	9%	Rev.Rul. 87-87, 1987-36 I.R.B. 8
01/01/88 - 03/31/88	10%	Rev.Rul. 87-131, 1987-50 I.R.B. 6
04/01/88 - 06/30/88	9%	Rev.Rul. 88-17, 1988-10 I.R.B. 6
07/01/88 - 09/30/88	9%	Rev.Rul. 88-50, 1988-25 I.R.B. 39
10/01/88 - 12/31/88	10%	Rev.Rul. 88-86, 1988-41 I.R.B. 1
01/01/89 - 03/31/89	10%	Rev.Rul. 88-105, 1988-51 I.R.B. 4
04/01/89 - 06/30/89	11%	Rev.Rul. 89-36, 1989-1 C.B. 309
07/01/89 - 09/30/89	11%	Rev.Rul. 89-69, 1989-1 C.B. 310
10/01/89 - 12/31/89	10%	Rev.Rul. 89-99, 1989-2 C.B. 256
01/01/90 - 03/31/90	10%	Rev.Rul. 89-125, 1989-2 C.B. 257
04/01/90 - 06/30/90	10%	Rev.Rul. 90-19, 1990-1 C.B. 186
07/01/90 - 09/30/90	10%	Rev.Rul. 90-47, 1990-1 C.B. 187
10/01/90 - 12/31/90	10%	Rev.Rul. 90-71, 1990-35 I.R.B. 4
01/01/91 - 03/31/91	10%	Rev.Rul. 90-94, 1990-46 I.R.B. 16
04/01/91 - 06/30/91	9%	Rev.Rul. 91-20, 1991-11 I.R.B. 1
07/01/91 - 09/30/91	9%	Rev.Rul. 91-33, 1991-21 I.R.B. 1
10/01/91 - 12/31/91	9%	Rev.Rul. 91-50, 1991-37 I.R.B. 1
01/01/92 - 03/31/92	8%	Rev.Rul. 91-65, 1991-51 I.R.B. 1
04/01/92 - 06/30/92	7%	Rev.Rul. 92-21, 1992-14 I.R.B. 14
07/01/92 - 09/30/92	7%	Rev.Rul. 92-44, 1992-24 I.R.B. 86
10/01/92 - 12/31/92	6%	Rev.Rul. 92-77, 1992-38 I.R.B. 12

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELEDIAL AMERICA, INC.,
Complainant,

v.

MICHIGAN BELL TELEPHONE COMPANY,
Defendant.

File No. E-89-424

MEMORANDUM OPINION AND ORDER

Adopted: January 29, 1993; Released: February 24, 1993

By the Commission:

TABLE OF CONTENTS

Topic	Paragraph No.
I. INTRODUCTION	1
II. BACKGROUND	2 - 4
III. DISCUSSION	5 - 40
A. Liability for Damages	5 - 15
1. Contentions of the Parties	5 - 10
2. Discussion	11 - 15
B. Damages and Interest Claims	16 - 40
1. Damages	16 - 37
a. Contentions of the Parties	17 - 26
b. Discussion	27 - 37
2. Interest on Damages	38 - 40
a. Contentions of the Parties	38 - 39
b. Discussion	40
IV. CONCLUSION	41
V. ORDERING CLAUSES	42 - 47

I. INTRODUCTION

1. In this Memorandum Opinion and Order we find that TeleDial America, Inc. (TeleDial) has met its burden of establishing that defendant local exchange company (LEC) has violated Section 201(b) of the Communications Act by earning in excess of the rate of return prescribed by the Commission for the period October 1, 1985 through December 31, 1986. In addition, we award TeleDial damages and interest for defendant's rate of return violations.

II. BACKGROUND

2. The Commission has previously held that LECs who had earned in excess of the prescribed rate of return for October 1, 1985 through December 31, 1986 violated Section 201(b) of the Communications Act (the "Act"), 47 U.S.C. § 201(b).[1] These decisions firmly establish that carrier rates that produce earnings in excess of the Commission's prescribed rate of return violate Section 201(b) of the Act[2] and allegations of such overearnings are sufficient to sustain a cause of action under Section 208 of the Act. Furthermore, we have held that complainants may recover damages, including interest, from LECs who violated the Commission's rate of return prescription.[3]

3. While a detailed accounting of the applicable statutory scheme and relevant Commission and court decisions that preceded the filing of the captioned complaint is set forth in the *MCI Liability Order*[4] and will not be repeated here, a very brief review of the relevant rate of return prescription is helpful. The Commission prescribed a rate of return of 12.75 percent for the initial monitoring period of October 1, 1985 through December 31, 1986.[5] Because the initial review period would be 15 months rather than two years as adopted in subsequent periods, the Commission expanded the "buffer"[6] that would be used to determine whether the

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[1] MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co., *et al.*, 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon. denied*, 5 FCC Rcd 3463 (1990) (*MCI Reconsideration Order*) (jointly "*MCI Orders*"), *appeal dismissed sub nom. Mountain States Tel. and Tel. Co., et al. v. FCC*, 951 F.2d 1259 (10th Cir. 1991) (per curiam) and American Telephone and Telegraph Company v. Northwestern Bell Telephone Co., 5 FCC Rcd 143 (1990) (*AT&T Liability Order*), *appeal dismissed sub nom. Mountain States Tel. and Tel. Co., et al. v. FCC*, 951 F.2d 1259 (10th Cir. 1991) (per curiam).

[2] 47 U.S.C. § 201(b). This Section provides, in pertinent part, that "[a]ll charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful."

[3] MCI Telecommunications Corporation v. Pacific Bell Telephone Company, *et al.*, FCC 93-70 (released February 8, 1993) (*MCI Damages Order*) and AT&T Communications v. Northwestern Bell Telephone Company, FCC 93-69 (February 8, 1993) (*AT&T Damages Order*).

[4] *MCI Liability Order*, 5 FCC Rcd at 217-218.

[5] *See* Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985) (*Phase I Order*), *on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,103 (Apr. 1, 1986) (*Phase I Reconsideration*), *on further reconsideration*, 2 FCC Rcd 190 (1987), *See also* Procedures and Methodologies to Establish Reporting Requirements, CC Docket No. 86-127, FCC 86-514 (released Dec. 3, 1986), 52 Fed. Reg. 273 (Jan. 5, 1987).

[6] *See MCI Liability Order*, 5 FCC Rcd at 217:

> ... the Commission established both an authorized rate of return and a 'spread' or 'buffer' above that return for use in proceedings relating to the enforcement of the prescription. In other words, the authorized return would be employed in computing tariff rates; the spread, or buffer, would be used in combination with the authorized return 'to determine whether a rate of return prescription had been violated.' [footnote omitted.]

prescription had been violated during this initial monitoring period.[7] Carriers were given notice that a 13.10 percent level of earnings would be the maximum allowable rate-of-return on overall interstate earnings and 13.25 percent would be the maximum allowable return for any access service category.[8]

4. In September 1989, TeleDial filed two formal complaints[9] alleging violation of the Commission's rate of return prescription.[10] In addition, TeleDial reserved the right to file supplemental complaints for damages as provided for in Section 1.722 of the Commission's rules[11] because it could not determine the precise amount of damages it suffered at the time its complaints were filed. The defendant filed an answer and a motion to dismiss. On June 8, 1992, the Common Carrier Bureau (Bureau) released an order establishing discovery and briefing schedules.[12] Pursuant to the *Discovery Order*, the parties submitted their initial briefs and reply briefs setting forth their respective claims and arguments.

III. DISCUSSION

A. Liability For Damages

1. Contentions of the Parties

5. TeleDial alleges that the rates it paid for the defendant's interstate access services during the period from October 1, 1985 through December 31, 1986 were unjust and unreasonable in violation of Section 201(b) of the Act, 47 U.S.C. § 201(b). TeleDial supports its allegations with evidence taken from reports filed with the Commission by the defendant for the 15-month period at issue that show that defendant achieved earnings in excess of the Commission's prescribed rate of return on one or more of the three interstate access categories established for the purpose of enforcing that rate of return prescription.[13]

6. TeleDial requests that the Commission declare that the defendant LEC's charges for the period from October 1, 1985 through December 31, 1986 are in violation of the rate of return prescription and Section 201(b) of the Act, and order the defendant LEC to pay damages to TeleDial equal to the difference between the amount actually paid by TeleDial for interstate access service during the period and the amount that TeleDial would have paid if the defendant's charges earned no more than the maximum allowable rate of return, plus interest on this amount at the highest rate among the reasonable alternatives available to the Commission.

7. In response to complainant's allegations, defendant raises a number of issues that have been fully considered by the Commission in the *MCI Orders*. They will be briefly discussed below.

8. Defendant advances a variety of arguments that TeleDial has failed to state a cause of action under the Act and that TeleDial's claims are barred by *American Telephone and Telegraph v. FCC*[14] and *Ohio Bell*, which was issued after the release of the *MCI Liability Order*. Michi-

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[7] *Phase I Order*, 50 Fed. Reg. at 41,352 (para. 21).

[8] 47 C.F.R. § 65.701(b) (1990).

[9] One of the complaints was settled by the parties. *See* TeleDial America, Inc. v. GTE North Incorporated, 7 FCC Rcd 8537 (Com.Car.Bur. 1992).

The remaining complaint was held in abeyance by the Commission pending resolution of a court remand in *Illinois Bell Tel. Co. v. FCC*, 911 F.2d 776 (D.C. Cir. 1990) (*Illinois Bell I*). *See* TeleDial America, Inc. v. Michigan Bell Telephone Company, *et al.*, 6 FCC Rcd 650 (Com.Car.Bur. 1991). Michigan Bell filed a motion on October 12, 1990 asking the Commission, in light of *Illinois Bell I*, to compel complainant to amend its complaint, designate this proceeding for an evidentiary hearing before an administrative law judge, or hold the proceeding in abeyance pending resolution of the remand. TeleDial filed an opposition. The Commission acted on the remand in October 1991. *See* Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, Decision on Remand, 7 FCC Rcd 296 (1991) (*Illinois Bell I Remand Decision*), *appeal docketed sub nom. Illinois Bell Telephone Co., et al. v. FCC*, No. 90-1020 (D.C. Cir. Jan.11, 1991). On December 13, 1991, the Bureau released an order that reactivated the instant case. *See* Order, 6 FCC Rcd 7293 (Com.Car.Bur. 1991). That action makes Michigan Bell's motion moot and, accordingly, we dismiss the motion.

[10] The remaining defendant is the Michigan Bell Telephone Company (Michigan Bell).

[11] 47 C.F.R. § 1.722. TeleDial mistakenly cited 47 C.F.R. § 1.723 dealing with joinder. However, TeleDial used language in the text of its complaints sufficient to reserve its rights under 47 C.F.R. § 1.722. Defendant did not challenge this error.

[12] TeleDial Communications, Inc. v. Michigan Bell Telephone Company, *et al.*, 7 FCC Rcd 3512 (Com.Car.Bur. 1992) (*Discovery Order*). TeleDial served interrogatories on Michigan Bell on June 18, 1992. Michigan Bell responded on July 8, 1992. Michigan Bell served interrogatories and, pursuant to 47 C.F.R. § 1.730, a motion to compel production of documents on TeleDial on June 19, 1992. TeleDial responded to the interrogatories on July 8, 1992 and filed an opposition to defendant's motion for production of documents on June 29, 1992. In support of its motion, defendant stated, "[T]his information is directly relevant to the damages alleged in this complaint. Consequently, Michigan Bell has demonstrated the good cause necessary for the Commission to grant this Motion." Assuming, *arguendo*, that the documents sought are relevant and that defendant has satisfied all the pleading requirements of 47 C.F.R. § 1.730, defendant must make a separate showing that there is good cause to compel production of the documents. *See* 47 C.F.R. § 1.730 ("Such motions will not be routinely granted except for good cause shown."). Defendant failed to make such a showing. Therefore, we will deny defendant's motion. TeleDial filed an opposed motion to compel response to interrogatories on July 28, 1992 and withdrew its motion on August 4, 1992. TeleDial filed its brief on July 28, 1992 (TeleDial Br.) and the defendant filed its brief at the same time (Michigan Bell Br.). TeleDial and Michigan Bell filed reply briefs on August 7, 1992 (TeleDial RBr. and Michigan RBr., respectively.)

[13] The interstate access service categories are special access, common line, and switched traffic sensitive. *See* 47 C.F.R. § 65.702. TeleDial states that the monitoring reports recite that for the period October 1, 1985 through December 31, 1986, Michigan Bell earned a return of 13.37% in the switched traffic sensitive category.

[14] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court invalidated the Commission's procedure to enforce its rate of return prescriptions through automatic refunds of carrier over-earnings to customers. For a detailed discussion of *AT&T v. FCC*, *see MCI Liability Order*, 5 FCC Rcd at 221-223. The Court of Appeals for the Sixth Circuit, relying on *AT&T v. FCC*, vacated a Commission order that dealt with refunds of earnings in excess of the authorized rate of return for the special access category over a period of years in the context of a strategic

gan Bell argues that our reasoning in the *MCI Liability Order* is flawed and contrary to *AT&T v. FCC* and *Ohio Bell*. Specifically, defendant argues that changing from an automatic refund structure to a complaint structure does not cure the inconsistencies the courts found with respect to the automatic refund rule.[15] Additionally, defendant argues that it is contrary to *AT&T v. FCC* and *Ohio Bell* to find a rate of return violation when overall earnings for interstate access service did not exceed 13.10 percent regardless of access category earnings in excess of 13.25 percent.[16] Defendant contends that these propositions are not narrowly confined to the Commission's ratemaking activities under Sections 204-205 of the Act[17] but are equally applicable when the Commission decides private complaints for damages under Section 208 of the Act.[18]

9. Defendant also argues that rates in question were not carrier initiated and therefore are not subject to damages claims.[19] Defendant further, relying on *Illinois Bell I*, argues that the monitoring reports inaccurately represent defendant's return on investment.[20]

10. The defendant argues that all of TeleDial's claims are barred by Section 415 of the Act, which establishes a two-year statute of limitations on the filing of complaints.[21] According to defendant, Section 415 bars the recovery of any damages if sought more than two years after the occurrence of any overearnings, in this case, thus barring all recovery after December 31, 1988. At the very latest, defendant argues, TeleDial could have filed two years after defendant filed its initial monitoring report in March of 1987.[22]

2. Discussion

11. We have carefully examined the record before us and conclude that the defendant has cited no facts and has made no argument here that would warrant a ruling contrary to the *MCI Orders*. We are not persuaded that our reasoning in the *MCI Liability Order* is contrary to *AT&T v. FCC* and *Ohio Bell*. Rather, we are persuaded that our decision in the *MCI Liability Order* complies with all applicable law.

12. *Failure to State a Cause of Action:* In the *MCI Liability Order*, we rejected identical claims and held that *AT&T v. FCC* establishes no precedent that bars an individual complainant from seeking a remedy under Section 208 of the Act for damages based on a carrier's reported overearnings.[23] We stated that

> we are not persuaded by the defendants' claims that earning in excess of a prescribed rate of return does not violate that Act or, if it does, that the Commission *is required* to take a carrier's underearnings as well as its overearnings into account in determining whether a violation has occurred.
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> * * * * * * * *
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> We find that a valid prescription bound the defendants to a maximum earnings limitation, and the defendants admit that they earned in excess of the amount during the period in question.[24]

We found further that *AT&T v. FCC* did not pertain to Section 208 complaint proceedings. The Commission has the authority to order a carrier to pay damages if a complainant meets the burden of establishing both a violation of the Act and the actual injury.[25]

13. *Statute of Limitations:* TeleDial is correct in its assertion that it had until September 30, 1989 to file its complaint based on the monitoring report filed by defendant with the Commission on September 30, 1987.[26] We have previously held that the date of the filing of the final monitoring report is the date a complainant discovers the

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pricing investigation. *See Ohio Bell Telephone Company v. FCC*, 949 F.2d 864 (6th Cir. 1991) (*Ohio Bell*). The court primarily relied upon the statement from *AT&T v. FCC* that a rate of return prescription is both a minimum and a maximum prescription. *See AT&T v. FCC*, 836 F.2d at 1390. The Commission has clarified, however, that it does not view a rate of return prescription as both a maximum and a minimum and has stated that

> [o]ur accumulated experience with rate of return prescriptions, and our review of the cost of capital evidence in this proceeding, convince us that there is no such point. * * * We believe there is a substantial gap between an earnings level that is fully adequate to assure attraction of capital on favorable terms, and an earnings level which, if sustained over time, would be confiscatory.

In the Matter of Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, 5 FCC Rcd 7507, 7532 (1990), *appeal docketed sub nom. Illinois Bell Telephone Co., et al. v. FCC*, No. 90-1020 (D.C. Cir. Jan. 11, 1991).

[15] Michigan Bell Br. at 11.

[16] *Id.* at 11-12. Extending this argument even further, Michigan Bell contends that the key rate of return with which TeleDial should be concerned is the overall earnings of the Ameritech Operating Companies (Ameritech) in the aggregate, not the individual categorical earnings of Ameritech's subsidiaries. In the aggregate, Ameritech and Michigan Bell earned less than 13.10%. *Id.* at 12. Ameritech is the parent holding company of Michigan Bell, Ohio Bell Telephone Company, Indiana Bell Telephone Company, Illinois Bell Telephone Company, and Wisconsin Bell, Inc. We have previously rejected this argument. *See AT&T Damages Order* at para. 23, citing to *AT&T Liability Order*, 5 FCC Rcd at 148, para. 47.

[17] 47 U.S.C. §§ 204-205.

[18] Michigan Bell Br. at 6-11.

[19] *Id.* at 13-15.

[20] *Id.* at 17-18.

[21] Section 415 provides, in pertinent part, that "[a]ll complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after...." 47 U.S.C. § 415(b) (1982). The term "overcharges" is defined in Section 415 "to mean charges for services in excess of those applicable thereto under the schedules of charges lawfully on file with the Commission." 47 U.S.C. § 415(g) (1982).

[22] Michigan Bell Br. at 15-17. TeleDial argues that it had until September 30, 1989 (two years from the date Michigan Bell filed its final monitoring report) to file its complaint. TeleDial Reply to Answer and Motion to Dismiss at 15.

[23] *MCI Liability Order*, 5 FCC Rcd at 222-223.

[24] *MCI Liability Order*, 5 FCC Rcd at 223 (emphasis in the original).

[25] *Id.*

[26] TeleDial cites to the Bureau's Show Cause Orders in both the AT&T and MCI proceedings to support its argument. *See, e.g.*, MCI Telecommunications Corp. v. Michigan Bell, *Order to Show Cause*, 4 FCC Rcd 6099, 6101, n.8. This holding was subsequently adopted by the Commission. *See MCI Liability Order*, 5 FCC Rcd at 224-225.

right or wrong or the facts on which such knowledge is chargeable as a matter of law.[27] Defendant has made no argument that persuades us to alter this holding. Section 415 does not bar TeleDial's complaints.

14. *Ohio Bell:* We disagree with the defendant's claim that *Ohio Bell* and *AT&T v. FCC* compel us to dismiss TeleDial's complaints. As we emphasized in the *MCI Liability Order* and reaffirmed in the *MCI Damages Order*, automatic refunds and refunds ordered under Section 204 of the Act are different from individual actions for damages under Section 208. Unlike the automatic refund mechanism in *AT&T v. FCC* or the refund procedure in *Ohio Bell*, both of which resulted from rulemaking proceedings initiated at the Commission's discretion, individual actions for damages under Section 208 are initiated by private parties seeking damages for injuries to themselves; those private parties have the burden of establishing both a violation of the Act and actual injury.[28] The courts in *AT&T v. FCC* and *Ohio Bell* did not discuss private complaints for damages; they did not invalidate private actions for damages; and their analysis is not applicable to the different separately authorized complaint procedure set forth in Sections 206-209. Accordingly, those decisions do not require us to depart from our holding in the *MCI Liability Order* that defendant has violated the Communications Act by earning in excess of a valid rate of return prescription, thereby making its rates unjust and unreasonable under Section 201 of the Communications Act and itself liable for damages to the extent a complainant/customer can establish that it was damaged as a result of the violation.[29]

15. *Illinois Bell I:* We also reject defendant's claim that the decision in *Illinois Bell I* renders the information contained in its Form 492 unreliable. In *Illinois Bell I*, the D.C. Circuit remanded for further consideration, *inter alia*, the issue of whether non-cash expenses should be excluded from our determination of the cash working capital allowance. In the *Illinois Bell I Remand Decision*, we found that our cash working capital allowance was properly calculated.[30] Therefore, we find this argument to be an impermissible collateral attack.

B. Damages and Interest Claims

16. TeleDial's damages claims rest primarily on the contention that the proper measure of damages it incurred as a result of the defendant's rate of return prescription violations is the difference between the amounts it actually paid the defendant for interstate access services during the October 1, 1985 through December 31, 1986 monitoring period and the amount it would have paid if the defendant's rates produced earnings that did not exceed the Commission's prescription. The defendant, however, has raised a number of challenges to TeleDial's damages claims, including a number of arguments that were previously considered and rejected by the Commission in the *MCI Liability Order*, *MCI Damages Order*, *AT&T Liability Order*, and *AT&T Damages Order*. We address the parties' pertinent contentions below.

1. Damages

a. Contentions of the Parties

17. TeleDial's damages claims rest primarily on the contention that the proper measure of the damages it incurred as a result of defendant's violations is the difference between the amount it actually paid defendant for interstate access services during the October 1, 1985 through December 31, 1986 period and the amount it would have paid if the defendant's rates had produced earnings that did not exceed the Commission's prescribed rate of return. In the *Discovery Order*, the Bureau stated that it tended to agree, in principle, that a possible measure of the damages stemming from defendant's rate of return violations could be that difference.[31] The Bureau was not persuaded on the record before it, however, that a damages determination based solely on such a measure necessarily reflected actual damages incurred by TeleDial.[32] The defendant was invited to submit evidence that could serve to mitigate or otherwise reduce TeleDial's damages claims. Specifically, the Bureau stated that evidence that would show that TeleDial's share of excessive earnings realized in a particular access category by a defendant could be offset or otherwise reduced due to facts and circumstances surrounding TeleDial's purchase of other interstate access services from such defendant for the relevant monitoring period might be relevant.[33]

18. Under its damages approach, TeleDial states that it should be awarded damages of $1,337 from Michigan Bell, exclusive of interest, which it claims represent TeleDial's contribution to Michigan Bell's earnings above the maximum 13.25 percent rate of return prescribed by the Commission for the switched traffic sensitive category.[34] TeleDial states that the data underlying these calculations were taken from the defendant's Form 492, defendant's response to discovery in this proceeding, and complainant's records.[35] To derive the stated amount, TeleDial calculated, for the study area and access service category in which the

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[27] *MCI Liability Order*, 5 FCC Rcd at 225

> the defendants filed the rate of return monitoring reports which...were developed by the Commission for several purposes, including making information about carrier earnings public[ly] available. Moreover, the monitoring reports relied on by MCI in its complaints were specifically designated by the Commission as a "final" and conclusively binding determination of a carrier's earnings.

We note further that, we have held that Section 415(e) is inapplicable to the type of complaints we deal with here. Section 415(e) concerns a carrier's liability to its customers for failure to transmit a message in accordance with its common carrier obligations. The instant complaints deal with the lawfulness of defendants' rates, not defendants' transmissions or obligations to transmit messages properly. *See MCI Reconsideration Order*, 5 FCC Rcd at 3464.

[28] *See MCI Liability Order*, 5 FCC Rcd at 222-223.

[29] *See MCI Liability Order*, 5 FCC Rcd at 226.

[30] 7 FCC Rcd at 299.

[31] *Discovery Order*, 7 FCC Rcd at 3513.

[32] *Id.*

[33] *Id.*

[34] TeleDial Br. at 31 and Attachment A.

[35] TeleDial Br. at 31-33 and Attachment A.

defendant's earnings exceeded the rate of return prescription of 12.75% plus the .50% buffer, the percentage of defendant's revenues allocable to complainant. TeleDial then multiplied this percentage by the amount of defendant's pre-tax overearnings[36] to get the amount it overpaid.[37] TeleDial also claims interest calculated at the maximum allowable rate of return for the monitoring period, compounded daily. TeleDial contends it is entitled to interest on the damage amount which, through July 31, 1992, yields a total award of $2,801.[38]

19. The defendant challenges TeleDial's damages claims on a number of grounds, raising several arguments that were previously considered and rejected by the Commission in the *MCI Liability Order, MCI Damages Order, AT&T Liability Order,* and *AT&T Damages Order.* Defendant contends that by simply basing its damages claim on a calculation of TeleDial's prorated share of category-level overearnings, Teledial asks the Commission to award it damages in the same amounts it would have received under the automatic refund rule invalidated by the court in *AT&T v. FCC.* Defendant maintains that complainant seeks a refund and to have the Commission effectively reinstate its refund rules.[39] Defendant next argues that complainant is seeking a retroactive adjustment to defendant's rates for 1985-86 and awarding damages as sought by complainant would violate the rule against retroactive ratemaking.[40]

20. Defendant next contends that, even if *AT&T v. FCC* and *Ohio Bell* do not preclude TeleDial's damages claims, the claims still fail because TeleDial has failed to show that it sustained actual damage as a result of defendant's rates.[41] Furthermore, defendant argues, TeleDial can not prove actual damages because, as a price taker, TeleDial would have had to have passed on any savings from lower Michigan Bell rates to its customers in the form of lower rates.[42]

21. Further, Michigan Bell argues that any award of damages to TeleDial should be reduced by the amount of Michigan Bell's underearnings in other access service categories in which TeleDial took service.[43] Defendant argues that *AT&T v. FCC* and *Ohio Bell,* as well as the equities of the situation, require such offsets.[44]

22. Finally, defendant argues that the Commission should not award damages based on the claims of TeleDial's subsidiary Superior Telecom (Superior). Defendant states that although another subsidiary was named in the complaint, Superior was not named and defendant had no notice of it until the discovery period following the issuance of the *Discovery Order.* Defendant states that it has no information or knowledge that TeleDial owns, controls, or has authority to pursue claims on behalf of Superior, and demands strict proof. Moreover, defendant argues, the claims of Superior are barred by the statute of limitations because Superior's claim was raised four years after the filing of the initial complaint.[45] Defendant further states that as of the time of filing its reply brief, complainant had provided no information about its ownership of Superior and had not explained why it was unable to raise Superior's claims when the complaint was filed.[46]

23. TeleDial counters that defendant's threshold arguments regarding the effect of the court's ruling in *AT&T v. FCC* have largely been rejected or precluded by the *MCI Liability Order* and the *AT&T Liability Order* and that *AT&T v. FCC* can not and should not be contorted to invalidate the statutory complaint remedy under Section 208 of the Act. TeleDial states that the damages remedy is not "transformed into an automatic refund merely because the Commission's formula for ascertaining the total amount of an 'automatic refund' is similar to the method traditionally utilized in damages proceedings" to calculate damages due a complainant who paid excessive rates.[47] TeleDial maintains that it has shown that defendant charged it rates that produced earnings in excess of the Commission's prescribed rate of return and argues that its damages are the excessive charges that it paid.[48]

24. TeleDial further argues that while equitable considerations are relevant to Section 204(a)(1), they are not relevant to private complaints for damages because the Commission has no discretion in the award of damages under Section 206 of the Act.[49] TeleDial reiterates that its claims are actions for damages, not for restitution or refunds.

25. TeleDial next argues that defendant should not be allowed to offset underearnings in certain access categories against overearnings in other access categories, regardless of whether defendant violated the overall rate of return prescription. Allowing such an offset, TeleDial argues, would render meaningless the category rate of return prescription, deny TeleDial full relief, and permit cross subsidization.[50]

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[36] TeleDial calculated defendant's pre-tax overearnings by multiplying defendant's annualized rate of return by the number of years in the monitoring period and defendant's switched rate base. TeleDial Br. at 32-33 and Attachment A.

[37] TeleDial Br. at 32-33 and Attachment A.

[38] TeleDial Br. at Attachment A. This amount, according to Attachment A, reflects interest from January 1, 1986. We note that TeleDial, in its brief at page 33, claims interest from the day following the close of the monitoring period, January 1, 1987. We address this issue in the interest section of this order.

[39] Michigan Bell Br. at 20-21. Defendant further contends that *Illinois Bell Telephone Company v. FCC,* 966 F.2d 1478 (D.C. Cir. 1992) (*Illinois Bell II*) bars the Commission from ordering a refund unless it has complied with the procedures identified in Section 204 of the Act. Defendant's reliance on *Illinois Bell II* is misplaced. This proceeding involves a claim for damages under Section 208, not a refund under Section 204. Therefore, *Illinois Bell II* is inapplicable.

[40] Michigan Bell Br. at 21.

[41] *Id.* at 19. Michigan Bell cites to *Southern Ry. Co. v. Seaboard Allied Milling Corp.,* 442 U.S. 444, 454-55 (1979) (*Seaboard*) to support its argument that TeleDial may only recover actual damages rather than the full amount of the overcharge. While it is true that a complainant in a Section 208 proceeding may only recover actual damages, we note that *Seaboard,* however, does not stand for the proposition that refunds for overcharges and an award of damages are always necessarily two different amounts. In fact, the Court acknowledges that these amounts may be identical. *See* 442 U.S. 444, 455, n.8.

[42] Michigan Bell Br. at 20.

[43] *Id.* at 22-23. Defendant offers its earnings of 12.61% in the special access category as an example.

[44] *Id.* at 22.

[45] *Id.* at 25.

[46] Michigan Bell RBr. at 8.

[47] TeleDial RBr. at 8.

[48] TeleDial cites to MCI's initial and reply briefs in File Nos. E-88-46S, E-88-44S, E-88-51S, E-88-54S to show that the measure of damages is the amount of overpayment and that the only proof it need produce is proof of the payment of unlawful rates. TeleDial RBr. at 7.

[49] TeleDial RBr. at 13.

[50] *Id.* at 12.

26. Finally, TeleDial argues, the claims of Superior are properly made and warrant an award of damages. TeleDial argues that its initial complaint should have put defendant on notice that its claim included those of all its subsidiaries and affiliates. Furthermore, TeleDial argues, it provided the relevant information at the earliest opportunity. TeleDial contends that it gave defendant timely notice of the amount of its claim by stating such amount in its brief. TeleDial also argues that the Commission has held that claims of subsidiaries are properly included in claims of the parent.[51] Finally, TeleDial argues, to deny Superior's claims would be to deny full compensation to complainant, unjustly enrich defendant, and "partially eviscerate" the Commission's rules.[52]

b. Discussion

27. *AT&T v. FCC and Ohio Bell:* The defendant's claim that the holdings in *AT&T v. FCC* and *Ohio Bell* control this proceeding and bar an award of damages to TeleDial is without merit for the reasons stated in the *MCI Liability Order*. We emphasized in that Order that the court in *AT&T v. FCC* explicitly acknowledged the Commission's authority to order a carrier to disgorge earnings in excess of a rate of return prescription,[53] finding only the remedy component of the Commission's rate of return prescription (the automatic refund mechanism) to be unlawful.[54] More to the point, we emphasized that "the [*AT&T v. FCC*] opinion does not address Section 208 complaint proceedings nor purport to alter the statutory scheme of the Act or the remedies Congress established therein."[55] Similarly, as we stated in the *MCI Damages Order*, the *Ohio Bell* decision does not expand upon *AT&T v. FCC* and does not address the Commission's authority to award damages in private complaint actions under Section 208 of the Act.[56]

28. *Claims of TeleDial's Subsidiaries:* First, we note that it is undisputed that the claims of TeleDial's subsidiary that was named in the initial complaint are properly included in TeleDial's claims. However, we find that the claims of Superior are not properly included in TeleDial's claims. Unlike the facts underlying the Bureau's finding in the *MCI Discovery Order*,[57] defendant has not admitted TeleDial's dominion and control over Superior and has demanded strict proof of ownership.[58] Complainant has provided no such proof.[59] Furthermore, we are not persuaded by TeleDial's arguments that to deny Superior's claims would be to deny complainant full compensation, unjustly enrich defendant, and "partially eviscerate" the Commission's rules. It does no harm to the Commission's rules or equity to require a complainant in a Section 208 proceeding to plead fully and prove its cause of action. Indeed, the rules require complainants to do so.[60]

29. *Damages and Offsets:* In the *MCI Damages Order* we reemphasized[61] the Commission's authority to prescribe and enforce carriers' rates of return, pointed out that the issue in these proceedings is not whether individual rates are unlawful, but whether cumulative rates that produced earnings over and above a prescribed rate of return are unjust and unreasonable, and agreed with the Bureau's determination in the *Discovery Order* that a proper starting point for assessing damages based on violations of a rate of return prescription is to look at the difference between the amount complainant paid for defendant's interstate access services and the amount it would have paid if defendant had charged rates that produced returns within the Commission's prescribed levels.[62] We said, "[i]t is appropriate and consistent with the Commission's rate of return regulatory scheme to inquire as to earnings in excess of prescribed levels for purposes of assessing damages claims."[63] TeleDial has shown that it purchased services from defendant at rates that produced earnings over and above the defendant's prescribed levels. We previously determined in the *MCI Liability Order* that a violation of such a prescription constitutes a violation of the Act for which damages may lie.

30. The defendant argues that TeleDial's damages claims are really claims for refunds. The defendant argues, in effect, that the damages TeleDial seeks are equivalent to refunds that would have been required under the refund mechanism invalidated by the court in *AT&T v. FCC*. We do not agree. We are concerned here with determining whether a particular customer, which has availed itself of a statutory complaint remedy under Title II of the Act, has sustained any measurable damage that can be traced to defendant's violations of the Act. Although a damages award under Section 208 of the Act might well be equal or substantially similar to a refund ordered under Section 204 of the Act,[64] this does not transform a private complaint action into a public enforcement proceeding under Section 204 of the Act.

31. We find defendant's argument with respect to "passing-on" equally unavailing. TeleDial has made a claim for specific damages, and the defendant, in turn, may properly

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[51] TeleDial Br. at 30, citing MCI Telecommunications Corp. v. Pacific Bell Telephone Co., *et al.*, 7 FCC Rcd 2985 (Com.Car.Bur. 1992) (*MCI Discovery Order*).

[52] TeleDial Br. at 30.

[53] *AT&T v. FCC*, 836 F.2d at 1392 ("Thus, as we previously have concluded, the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate of return prescription").

[54] Indeed, the court in *Ohio Bell* recognized the continuing efficacy of our rate of return framework. *See* 949 F.2d at 868.

[55] *MCI Liability Order*, 5 FCC Rcd at 223.

[56] *MCI Damages Order* at para. 26.

[57] The Bureau relied on the fact that the defendants in the *MCI Discovery Order* did not dispute MCI's ownership of the subsidiaries in question at all times relevant to the complaint and that those subsidiaries took service at the rates that produced the earnings levels at issue in the complaint. 7 FCC Rcd at 2987.

[58] *See* Michigan Bell Br. at 25.

[59] We credit defendant's statement that TeleDial has provided no such proof. *See* Michigan Bell RBr. at 8.

[60] *See* 47 C.F.R. § 1.720(a)-(e).

[61] For a full discussion of the Commission's authority to prescribe and enforce carriers' rates of return, *see MCI Liability Order*, 5 FCC Rcd 222-223.

[62] *MCI Damages Order* at para. 29.

[63] *Id.*

[64] *See Seaboard*, 442 U.S. 444, 455, n.8:

> If a shipper proves a rate is unreasonable and that he was damaged in the full amount he was overcharged, the outcome of a § 13(1) [§ 208] proceeding will be no different than that of a § 15(8)(a) [§ 204] proceeding in which the carrier fails to establish the reasonableness of the rate.

argue that it is entitled to certain offsets against those damages. Defendant, however, cannot simply make damages "go away" by alleging that TeleDial would have passed on the additional costs resulting from defendant's excessive earnings to its customers. Whether TeleDial passed on the overcharges or absorbed them does not alter the fact that the defendant overcharged TeleDial in violation of a binding rate of return prescription and must answer for such violations. TeleDial clearly has a claim for damages because it had to pay more for service than it would have if defendant's rates had produced earnings at or within the Commission's prescribed levels. Even if TeleDial passed on the overcharges, it is very likely that TeleDial's sales to customers were adversely affected to the extent that its own rates were higher. The issue, however, is not what TeleDial has done in response to paying excessive rates, but whether TeleDial has been damaged as a result of these excessive rates.[65]

32. We reject TeleDial's claim that the allowance of offsets would somehow repeal our rate of return prescription on a category basis. The issue of damages to a particular complainant is separate and apart from the validity and effect of our rate of return prescription. The determination we make here is the extent to which complainant suffered damage on account of defendant's violations of the rate of return prescription. The question of offsets is relevant to that determination and no other.

33. Michigan Bell raises factors which it believes warrant an offset against TeleDial's damages claims. Michigan Bell states that it underearned on its common line and special access services. Michigan Bell calculates that the amount of the offsets is greater than the amount of overcharges by approximately $14,303.[66]

34. In the *MCI Liability Order*, we specifically rejected claims by the defendants that the Commission is required to take a carrier's interstate access underearnings as well as overearnings into account in determining whether a violation of the Act has occurred because this would be at odds with established case law.[67] We cannot, however, accept TeleDial's suggestion that we should not consider its overall purchase of interstate access services from the defendant during a particular monitoring period in assessing the damage or injury to that complainant.[68] We continue to believe, as courts have made clear, that carriers assume the risk of both losses for services they underprice and the prospect of returning amounts realized through rates that are unjustly and unreasonably high.[69] We also maintain our view that a carrier may properly be required to make whole those who have been injured by unlawful rates and practices without regard to whether the carrier has achieved its authorized rate of return overall.[70] Nevertheless, we believe it appropriate for purposes of assessing TeleDial's damages claims to examine TeleDial's overall purchase of interstate access services from the defendant during the period in question. Significantly, TeleDial does not dispute that, in its purchase of defendants' interstate access services, it benefitted substantially from defendants' rates that produced underearnings in one or more access categories. Nor does it dispute that defendants, consistent with the Commission's rate of return prescription requirements, could have lawfully effected changes in those rates in order to bring their earnings in line with the authorized level, resulting in higher charges to TeleDial.[71] Thus, while we view it as a reasonable starting point to look at the difference between the amounts TeleDial paid for defendant's access services on a category basis and the amount it would have paid if defendant had earned at the prescribed level for the relevant category, we find it also reasonable to offset payments by TeleDial that contributed to defendant's excessive earnings to the extent that it can be shown that TeleDial benefitted from defendant's undercharges during the relevant period. For the reasons stated in the *MCI Damages Order*, we do not agree with TeleDial's contention that this approach results in unlawful cross-subsidization.[72]

35. Although defendant claims underearnings setoffs in both the common line and special access categories, we find that defendant did not underearn in the common line category. Defendant earned 12.85% in the common line category, thus exceeding its target rate of return of 12.75%. Defendant did underearn in the special access category with earnings of 12.61%. Therefore, defendant is entitled to offset its underearnings in the special access category to the extent it earned less than the 12.75% target. Because defendant incorrectly calculated the amount of its underearnings using the target plus buffer,[73] we recalculate TeleDial's share of its underearnings in the special access category, using the 12.75% category target rate of return and Michigan Bell's methodology,[74] to be $1.234.

36. Furthermore, we adopt TeleDial's calculation of its share of defendant's overearnings in the switched traffic sensitive category because TeleDial used the dollar amount of its purchases in the switched traffic sensitive category

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[65] In any event, while defendant has asserted that lower charges to TeleDial would have resulted in lower charges to TeleDial customers, it has provided no evidence in support of this contention.

[66] Michigan Bell Br. at 25 and Attachment A. Defendant used 13.25% in calculating the amount of offsets. We note that 13.25% is the target rate of return plus buffer for category earnings. Defendant can not, however, be said to have underearned to the extent that its earnings exceeded the target rate of return. Therefore, defendant's offset calculations are in error to the extent it calculated underearnings in particular categories using the category target rate of return plus buffer.

[67] *MCI Liability Order*, 5 FCC Rcd at 223, paras. 59-60, citing *Nader v. FCC*, 520 F.2d 182, 201 (D.C. Cir. 1975). *See also New England Telephone and Telegraph Co. v. FCC*, 826 F.2d 1101 (D.C. Cir. 1987), *cert denied*, 109 S.Ct. 1942 (1989); and *AT&T v. FCC*.

[68] We noted in the *MCI Liability Order* that the Constitution does not prohibit the Commission from ordering damages when a carrier has overearned on a service category, citing the prevention of cross-subsidization as a long-recognized objective of rate regulation. *MCI Liability Order* at 223. We did not, however, preclude defendant carriers from raising circumstances surrounding a customer/complainant's purchase of interstate access, including those in other access service categories, as a defense to damages claims.

[69] *Id.* at 223.

[70] *Id.*

[71] *See Id.*

[72] *See MCI Damages Order* at para. 39.

[73] *See* note 66 *supra*.

[74] We note that TeleDial used a slightly different methodology, but both methodologies yield the same result. We used defendant's methodology for convenience sake. Defendant provided information on the common line and special access categories, whereas TeleDial did not. TeleDial did not dispute defendant's calculations.

stipulated by the parties.[75] TeleDial calculates its share of defendant's overearnings in the switched traffic sensitive category to be $1,337.[76]

37. Based on our decision regarding the computation of damages here, we award damages to TeleDial from Michigan Bell in the amount of $103. We calculated this amount by subtracting TeleDial's share of defendant's underearnings in the special access category from TeleDial's share of defendant's overearnings in the switched traffic sensitive category.

2. Interest on Damages Awards

a. Contentions of the Parties

38. Defendant's final claim is that TeleDial is not entitled to prejudgment interest should the Commission award damages to TeleDial. Michigan Bell concedes that the Commission has considerable discretion in deciding whether to award prejudgment interest in a complaint proceeding. Defendant further states that the Commission is guided by considerations of fairness. Therefore, defendant argues that fairness suggests that interest should not be awarded in this proceeding. Specifically, defendant contends that it did not unilaterally decide to withhold money from TeleDial, it did not intentionally target its rates to produce overearnings, interest is not necessary to make TeleDial whole, and the amount of damages was not certain. In any event, defendant argues, interest should not be awarded on any portion of any damage award allocable to Superior Telecom.

39. TeleDial disputes defendant's claim that it is not entitled to prejudgment interest. TeleDial relies on the *Discovery Order* to show that the Commission has authority to award interest and that the issue remaining is whether interest is appropriate in this proceeding.[77] TeleDial contends that an award of prejudgment interest is appropriate in the instant case because the damage liability was sufficiently certain at the close of the monitoring period and an award of interest is required to fully effectuate the statutory complaint remedy.[78] TeleDial contends it is entitled to interest at what it calls the "maximum allowable rate of return on claims"--13.25%.[79]

b. Discussion

40. In deciding whether to award interest in a particular common carrier complaint case we are generally guided by federal court practice, where the award of prejudgment interest "... is a matter left to the sound discretion of the trial court."[80] The award of interest in a common carrier complaint case is thus guided by considerations of fairness. Applying this standard, we are persuaded that an award of interest is appropriate in this case. TeleDial was effectively deprived of the use of the excessive amounts it paid Michigan Bell as a result of Michigan Bell's unlawful rates while Michigan Bell, on the other hand, enjoyed the beneficial use for a substantial period of time of funds to which TeleDial rightfully has a claim. We are persuaded that interest is required not only to effect a full and fair remedy for TeleDial, which paid rates higher than it would have paid had defendant earned within the prescribed level, but also to avoid any unjust enrichment of defendant stemming from its charging rates that we have determined to be unjust and unreasonable under Section 201(b) of the Act.[81] Therefore, we award TeleDial interest on the damages recovered computed at the IRS rate for tax refunds.[82] In addition, we find that interest should begin to accrue from January 1, 1987, the day after which the 1985-1986 monitoring period ended. At that point, Michigan Bell was subject to the earnings limitations of a new monitoring period.

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[75] The dollar amount of TeleDial's purchases in the switched traffic sensitive category was a matter of dispute during discovery. Defendant estimated TeleDial's purchases because its computer tapes containing billing information were unavailable. TeleDial moved to compel defendant to calculate the amount of purchases from its paper records. TeleDial, however, offered to withdraw its motion to compel if defendant would stipulate to TeleDial's purchases amount. TeleDial subsequently withdrew its motion to compel on August 4, 1992. In its withdrawal notice, TeleDial stated that the parties stipulated that TeleDial's purchases of defendant's switched traffic sensitive services were $362,421.48. We note that defendant used its estimate of TeleDial's purchases in its brief. However, defendant did not deny that it stipulated to the amount set forth by Teledial. We note that the parties disputed in their briefs whether the claims of Superior Telecom should be included in TeleDial's claims, but it is not clear from the record whether the difference in the purchases amounts set forth by the parties in their briefs represent the amount of Superior Telecom's purchases or result from an inaccuracy in defendant's estimate of TeleDial's purchases. Therefore, we accept TeleDial's calculation of its share of defendant's overearnings in the switched traffic sensitive category.

[76] TeleDial Br. at Attachment A.

[77] TeleDial Br. at 24.

[78] TeleDial Br. at 25-28.

[79] TeleDial Br. at Attachment A.

[80] *United States v. California Board of Equalization*, 650 F.2d 1127, 1132 (9th Cir. 1981), *aff'd*, 456 U.S. 901 (1982), *reh'g denied*, 456 U.S. 985 (1982).

[81] *See New England Telephone and Telegraph Co. v. FCC*, 826 F.2d 1101, 1113 (D.C. Cir. 1987), *cert. denied*, 109 S. Ct. 1942 (1989) (carriers may reasonably be required "to pay full interest for earnings they had no right to retain in the first place.").

[82] We believe that the rationale adopted by the Commission for applying the IRS rate in pole attachment complaint proceedings under Section 224 of the Act, 47 U.S.C. § 224, is equally applicable here. In Teleprompter of Fairmont v. C&P of West Virginia, 79 FCC 2d 232 (1980), the Commission stated

> As a matter of fairness, we believe that the rate of interest applied in a pole attachment complaint proceeding should be readily available, easily applied, and periodically revised to reflect changes in borrowing costs. In light of these considerations, we find the interest rate for federal tax refunds and additional tax payments suitable for use in this type of proceeding. This rate appears in a variety of easily obtained official and commercial publications, and is revised on a regular basis. [Footnote omitted.]

79 FCC 2d at 238.

IV. CONCLUSION

41. We have carefully reviewed the extensive record before us and have found that complainant is entitled to an award of damages to the extent indicated here, plus accumulated interest on such damages amount, for Michigan Bell Telephone Company's violations of our rate of return prescription for the 1985-1986 monitoring period.

V. ORDERING CLAUSES

42. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201, 206, 207, 208, and 209 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201, 206, 207, 208, and 209, that Michigan Bell Telephone Company SHALL PAY to TeleDial America, Inc. the sum of $103 (one hundred three dollars) within 60 days after the release date of this Memorandum Opinion and Order.

43. IT IS FURTHER ORDERED that Michigan Bell Telephone Company SHALL PAY to TeleDial America, Inc. interest on the damages awarded here computed at the IRS rates set forth in Appendix A, beginning January 1, 1987 until the date full payment is made.

44. IT IS FURTHER ORDERED that the Motion to Compel Production of Documents filed by Michigan Bell on June 19, 1992 IS DENIED.

45. IT IS FURTHER ORDERED that the Motion to Dismiss filed by Michigan Bell on November 27, 1989 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Effective Period	Rate	Internal Revenue Service Citation
01/01/87 - 03/31/87	8%	Rev.Rul. 146, 1986-2 C.B. 208
04/01/87 - 06/30/87	8%	Rev.Rul. 87-23, 1987-13 I.R.B. 46
07/01/87 - 09/30/87	8%	Rev.Rul. 87-62, 1987-29 I.R.B. 10
10/01/87 - 12/31/87	9%	Rev.Rul. 87-87, 1987-36 I.R.B. 8
01/01/88 - 03/31/88	10%	Rev.Rul. 87-131, 1987-50 I.R.B. 6
04/01/88 - 06/30/88	9%	Rev.Rul. 88-17, 1988-10 I.R.B. 6
07/01/88 - 09/30/88	9%	Rev.Rul. 88-50, 1988-25 I.R.B. 39
10/01/88 - 12/31/88	10%	Rev.Rul. 88-86, 1988-41 I.R.B. 1
01/01/89 - 03/31/89	10%	Rev.Rul. 88-105, 1988-51 I.R.B. 4
04/01/89 - 06/30/89	11%	Rev.Rul. 89-36, 1989-1 C.B. 309
07/01/89 - 09/30/89	11%	Rev.Rul. 89-69, 1989-1 C.B. 310
10/01/89 - 12/31/89	10%	Rev.Rul. 89-99, 1989-2 C.B. 256
01/01/90 - 03/31/90	10%	Rev.Rul. 89-125, 1989-2 C.B. 257
04/01/90 - 06/30/90	10%	Rev.Rul. 90-19, 1990-1 C.B. 186
07/01/90 - 09/30/90	10%	Rev.Rul. 90-47, 1990-1 C.B. 187
10/01/90 - 12/31/90	10%	Rev.Rul. 90-71, 1990-35 I.R.B. 4
01/01/91 - 03/31/91	10%	Rev.Rul. 90-94, 1990-46 I.R.B. 16
04/01/91 - 06/30/91	9%	Rev.Rul. 91-20, 1991-11 I.R.B. 1
07/01/91 - 09/30/91	9%	Rev.Rul. 91-33, 1991-21 I.R.B. 1
10/01/91 - 12/31/91	9%	Rev.Rul. 91-50, 1991-37 I.R.B. 1
01/01/92 - 03/31/92	8%	Rev.Rul. 91-65, 1991-51 I.R.B. 1
04/01/92 - 06/30/92	7%	Rev.Rul. 92-21, 1992-14 I.R.B. 14
07/01/92 - 09/30/92	7%	Rev.Rul. 92-44, 1992-24 I.R.B. 86
10/01/92 - 12/31/92	6%	Rev.Rul. 92-77, 1992-38 I.R.B. 12

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WILLIAMS TELECOMMUNICATIONS GROUP, INC.,
Complainant,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	File No. E-89-397
NEW JERSEY BELL TELEPHONE COMPANY, and	File No. E-89-398
NORTHWESTERN BELL TELEPHONE COMPANY,	File No. E-89-400
Defendants.	

MEMORANDUM OPINION AND ORDER

Adopted: January 29, 1993; Released: February 24, 1993

By the Commission:

TABLE OF CONTENTS

Topic	Paragraph No.
I. INTRODUCTION	1
II. BACKGROUND	2 - 4
III. DISCUSSION	5 - 39
A. Liability for Damages	5 - 16
1. Contentions of the Parties	5 - 12
2. Discussion	13 - 16
B. Damages and Interest Claims	18 - 39
1. Damages	18 - 36
a. Contentions of the Parties	19 - 25
b. Discussion	26 - 36
2. Interest on Damages	37 - 39
a. Contentions of the Parties	37 - 38
b. Discussion	39
IV. CONCLUSION	40
V. ORDERING CLAUSES	41 - 46

I. INTRODUCTION

1. In this Memorandum Opinion and Order we find that Williams Telecommunications Group, Inc.[1] (WTG) has met its burden of establishing that defendant local exchange carriers[2] (LECs) have violated Section 201(b) of the Communications Act by earning in excess of the rate of return prescribed by the Commission for the period October 1, 1985 through December 31, 1986. In addition, we award WTG damages and interest for defendants' rate of return violations.

II. BACKGROUND

2. The Commission has previously held that LECs who had earned in excess of the prescribed rate of return for October 1, 1985 through December 31, 1986 violated Section 201(b) of the Communications Act (the "Act").[3] These decisions firmly establish that carrier rates producing earnings in excess of the Commission's prescribed rate of return violate Section 201(b) of the Act[4] and allegations of such overearnings are sufficient to sustain a cause of action under Section 208 of the Act. Furthermore, the Commission has held that complainants may recover damages, including interest, from LECs who violated the Commission's rate of return prescription.[5]

3. While a detailed accounting of the applicable statutory scheme and relevant Commission and court decisions that preceded the filing of the captioned complaints is set forth in the *MCI Liability Order*[6] and will not be repeated here, a brief review of the relevant rate of return prescription is helpful. The Commission prescribed a rate of return of 12.75 percent for the initial monitoring period of October

[1] The complaint was filed on behalf of the following operating subsidiaries of WTG during the relevant monitoring period: WTG - West, Inc.; WTG - East, Inc. (formerly LIGHTNET); WTG - Central, Inc. (formerly LDX NET, Inc. and WTG - Central, Inc.); and Houston Network (the predecessor of Vyvx Telecom, Inc. (formerly HNI Acquisition Corporation and Axcess Telecommunications, Inc.).

[2] The subject complaint was filed against Northwestern Bell Telephone Company (NWB). Northwestern Bell Telephone Company, Mountain States Telephone and Telegraph Company and Pacific Northwest Bell Telephone Company have consolidated. U S West is the remaining company. *See* The Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company, 5 FCC Rcd 1982 (1990). At the time the complaint was filed, The Mountain States Telephone and Telegraph Company, NWB and Pacific Northwest Bell Telephone Company were wholly-owned subsidiaries of U S West, Inc. For purposes of this proceeding, we will use NWB for the defendant where appropriate.

[3] MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co., *et al.*, 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon. denied*, 5 FCC Rcd 3463 (1990) (*MCI Reconsideration Order*) (jointly "*MCI Orders*"), *appeal dismissed sub nom. Mountain States Tel. and Tel. Co., et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991) (per curiam) and American Telephone and Telegraph Co. v. Northwestern Bell Telephone Co., 5 FCC Rcd 143 (1990), *appeal dismissed sub nom. Mountain States Tel. and Tel. Co., et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991) (per curiam).

[4] 47 U.S.C. § 201(b). This Section provides, in pertinent part, that "[a]ll charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful."

[5] MCI Telecommunications Corporation v. Pacific Bell Telephone Company, *et al.*, FCC 93-70 (released February 8, 1993) (*MCI Damages Order*).

[6] *MCI Liability Order*, 5 FCC Rcd at 217-218.

1, 1985 through December 31, 1986.[7] Because the initial review period would be only 15 months rather than the two years of subsequent review periods, the Commission expanded the "buffer"[8] that would be used during this initial monitoring period to determine whether the prescription had been violated.[9] Carriers were given notice that a 13.10 percent level of earnings would be the maximum allowable rate of return on overall interstate earnings and 13.25 percent would be the maximum allowable return for any access service category.[10]

4. In September 1989, WTG filed the subject formal complaints[11] against the defendant LECs alleging violation of the Commission's rate of return prescription. In addition, WTG reserved the right to file supplemental complaints for damages as provided for in Section 1.722 of the Commission's rules[12] because it could not determine the precise amount of damages it suffered at the time its complaints were filed. The defendants filed answers and motions to dismiss.[13] On June 9, 1992, the Common Carrier Bureau (Bureau) released an order establishing discovery and briefing schedules.[14] Pursuant to the *Discovery Order*, the parties submitted their initial briefs and reply briefs setting forth their respective claims and arguments.

III. DISCUSSION

A. Liability For Damages

1. Contentions of the Parties

5. WTG alleges that the rates it paid for certain of the defendants' interstate access services during the period from October 1, 1985 through December 31, 1986 were unjust and unreasonable in violation of Section 201(b) of the Act. WTG supports its allegations with evidence taken from reports filed with the Commission by the defendants for the 15-month period at issue that show that defendants achieved earnings in excess of the Commission's prescribed rate of return on one or more of the three interstate access categories established for the purpose of enforcing that rate of return prescription.[15]

6. WTG requests that the Commission declare that the defendant LECs' charges for the period from October 1, 1985 through December 31, 1986 are in violation of the rate of return prescription and Section 201(b) of the Act, and order the defendant LECs to pay damages to WTG equal to the difference between the amount actually paid by WTG for interstate access service during the period and the amount that WTG would have paid if the defendants' charges earned no more than the maximum allowable rate of return, plus interest.

7. The defendants raise a number of issues that have been fully considered by the Commission in the *MCI Orders*. They will be briefly discussed below.

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[7] *See* Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985) (*Phase I Order*), *on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,103 (Apr. 1, 1986) (*Phase I Reconsideration*), *on further reconsideration*, 2 FCC Rcd 190 (1987). *See also* Procedures and Methodologies to Establish Reporting Requirements, CC Docket No. 86-127, FCC 86-514 (released Dec. 3, 1986), 52 Fed. Reg. 273 (Jan. 5, 1987).

[8] *See MCI Liability Order*, 5 FCC Rcd at 217:

> ... the Commission established both an authorized rate of return and a 'spread' or 'buffer' above that return for use in proceedings relating to the enforcement of the prescription. In other words, the authorized return would be employed in computing tariff rates; the spread, or buffer, would be used in combination with the authorized return 'to determine whether a rate of return prescription had been violated.' [footnote omitted.]

[9] *Phase I Order*, 50 Fed. Reg. at 41,352 (para. 21).

[10] 47 C.F.R. § 65.701(b) (1990).

[11] Due to the similarity of the issues and arguments raised by the defendants, the complaints have been consolidated for disposition. These complaints were held in abeyance by the Commission pending resolution of a court remand in *Illinois Bell Tel. Co. v. FCC*, 911 F.2d 776 (D.C. Cir. 1990). *See* Williams Telecommunications Group, Inc. v. The Chesapeake and Potomac Telephone Companies, *et al.*, 6 FCC Rcd 641 (Com.Car.Bur. 1991). The Commission acted on the remand in October 1991. *See* Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, Decision on Remand, 7 FCC Rcd 296 (1991), *appeal docketed sub nom. Illinois Bell Telephone Co., et al. v. FCC*, No. 90-1020 (D.C. Cir. Jan.11, 1991). On December 13, 1991, the Bureau released an order that reactivated the instant cases. *See* Order, 6 FCC Rcd 7290 (Com.Car.Bur. 1991).

[12] 47 C.F.R. § 1.722.

[13] On February 13, 1992, NWB filed a supplement to its motion to dismiss (NWB Supplement). WTG filed an opposition on February 26, 1992 and NWB replied on March 6, 1992. We will accept the NWB Supplement for filing since WTG has had opportunity to respond.

[14] Williams Telecommunications Group, Inc. v. The Chesapeake and Potomac Telephone Companies, *et al.*, 7 FCC Rcd 3759 (Com.Car.Bur. 1992) (*Discovery Order*). WTG had pending motions to compel responses to its interrogatories filed on January 5, 1990. WTG served interrogatories on the defendants on June 25, 1992. NWB also served interrogatories on WTG on June 25, 1992. The parties responded to their respective requests on July 15, 1992. WTG filed its briefs (WTG Br.) on August 3, 1992 and its reply brief (WTG RBr.) on August 19, 1992. The defendants filed briefs (C&P Br.; NJB Br.; NWB Br.) on August 4, 1992. NWB filed its reply brief (NWB RBr.) on August 19, 1992 and the other defendants filed reply briefs (C&P/NJB RBr.) on August 14, 1992.

[15] The interstate access service categories are special access, common line, and switched traffic sensitive. *See* 47 C.F.R. § 65.702. WTG states that the monitoring reports recite that for the period October 1, 1985 through December 31, 1986, The Chesapeake and Potomac Telephone Companies (C&P) earned a return of 13.38% in the switched traffic sensitive category; New Jersey Bell Telephone Company (NJB) earned a return of 14.74% in the switched traffic sensitive category; NWB earned returns in the switched traffic sensitive category of 14.64% in Iowa; 14.33% in Minnesota; 15.79% in Nebraska; 19.71% in North Dakota; and earned returns in the special access category of 14.31 in Iowa; 13.85% in Minnesota; 16.63% in Nebraska; and 16.01% in North Dakota.

8. Defendants advance a variety of arguments to support their claim that WTG has failed to state a cause of action under the Act. Primarily, the defendants argue that WTG's claims are barred by *American Telephone and Telegraph Co. v. FCC*.[16] These arguments take on several forms. The defendants contend that renaming a "refund" as a "damage award" does not cure the inconsistencies the court found with respect to the automatic refund rule and allow the awarding of damages in the instant complaints.[17] The defendants argue that the Commission must consider underearnings in determining whether particular overearnings are in violation of the Act.[18] Finally, the defendants argue that it is contrary to *AT&T v. FCC* to find a rate of return violation when overall earnings for interstate access service did not exceed 13.10 percent regardless of access category earnings in excess of 13.25 percent.[19]

9. Defendants also argue that the Commission is engaging in retroactive ratemaking should it order a carrier to make refunds solely because the carrier has exceeded the authorized rate of return.[20] NWB also argues that rates charged in conformity with a lawfully filed tariff cannot then be found to be unjust and unreasonable merely because they later proved to be too profitable.[21]

10. Each defendant argues that all of WTG's claims are barred by Section 415 of the Act, which establishes a two-year statute of limitations on the filing of complaints.[22] Most of the defendants argue that applications of the accrual date in Section 415(e) bars WTG's complaints because accrual took place at the time defendants filed their initial monitoring reports.[23] According to the defendants, Section 415 bars the recovery of any damages if sought more than two years after the occurrence of any overearnings, in this case, thus barring all recovery sought after December 31, 1988.[24]

11. Defendants also argue that the decision in *Ohio Bell*, issued after the release of the *MCI Liability Order*, requires dismissal of WTG's complaints.[25] According to the defendants, *Ohio Bell* reaffirms the proposition established in *AT&T v. FCC* that the Commission cannot award damages for carrier overearnings without allowing the carrier to re-coup or off-set underearnings.[26] Defendants contend that these propositions are not confined to the Commission's ratemaking activities under Sections 204-205 of the Act but are equally applicable when the Commission decides private complaints for damages under Sections 206 through 209 of the Act.

12. In opposition, WTG reiterates its argument that the *MCI Liability Order* declared that offsetting excessive rates to one class of customers with inadequate rates to another class, would involve cross-subsidization.[27] WTG argues that *Ohio Bell* relies heavily upon *AT&T v. FCC*, which the Commission has already found to be irrelevant to complaints filed pursuant to Section 208.[28] According to WTG, the instant complaint does not involve the automatic refund mechanism, but a private cause of action adjudicated by the Commission.

2. Discussion

13. We have carefully examined the record before us and conclude that the defendants, all of whom were defendants in the MCI complaint proceedings, have cited no facts and have made no arguments here that would warrant a ruling contrary to the *MCI Orders*.

14. *Failure to State a Cause of Action:* In the *MCI Liability Order*, we rejected identical claims made by the same defendants and held that *AT&T v. FCC* establishes no

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[16] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court invalidated the Commission's procedure to enforce its rate of return prescriptions through automatic refunds of carrier overearnings to customers. For a detailed discussion of *AT&T v. FCC*, *see MCI Liability Order*, 5 FCC Rcd at 221-223. The U.S. Court of Appeals for the Sixth Circuit, relying on *AT&T v. FCC*, vacated a Commission order dealing with refunds of earnings in excess of the authorized rate of return for the special access category over a period of years in the context of a strategic pricing investigation. *See Ohio Bell v. FCC*, 949 F.2d 864(6th Cir. 1991) (*Ohio Bell*). The court primarily relied upon the statement from *AT&T v. FCC* that a rate of return prescription is both a minimum and a maximum prescription. *See AT&T v. FCC*, 836 F.2d at 1390. The Commission has clarified, however, that it does not view a rate of return prescription as both a maximum and a minimum and has stated that

> [o]ur accumulated experience with rate of return prescriptions, and our review of the cost of capital evidence in this proceeding, convince us that there is no such point. * * * We believe there is a substantial gap between an earnings level that is fully adequate to assure attraction of capital on favorable terms, and an earnings level which, if sustained over time, would be confiscatory.

Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, 5 FCC Rcd 7507, 7532 (1990), *appeal docketed sub nom. Illinois Bell Telephone Co., et al. v. FCC*, No. 90-1020 (D.C. Cir. Jan. 11, 1991).

[17] *See, e.g.*, NWB Br. at 5.

[18] *See, e.g.*, NWB Answer, Affirmative Defenses and Motion to Dismiss at paras. 16-17.

[19] *See, e.g.*, C&P Motion to Dismiss at 3. Extending this argument even further, NWB contends that the key rate of return with which WTG should be concerned is the overall earnings of USWC in the aggregate, not the individual categorical earnings of USWC's subsidiaries. In the aggregate, USWC earned 12.73% overall. NWB Answer at para. 15.

[20] *See, e.g.*, NWB Br. at 7; C&P Motion to Dismiss at 4.

[21] NWB Answer at para. 18.

[22] Section 415 provides, in pertinent part, that "[a]ll complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after...." 47 U.S.C. § 415(b). The term "overcharges" is defined in Section 415 "to mean charges for services in excess of those applicable thereto under the schedules of charges lawfully on file with the Commission." 47 U.S.C. § 415(g).

[23] Section 415(e) provides that "the cause of action in respect of the transmission of a message shall ... be deemed to accrue upon delivery or tender of delivery thereof by the carrier, not after." 47 U.S.C § 415(e).

[24] *See* MTN Answer at para. 19.

[25] NWB Supplement at 2-3.

[26] *Id.* at 4-5.

[27] WTG Opposition to Supplement at 3, *citing MCI Liability Order* at 223.

[28] *Id.* at 2.

precedent that bars an individual complainant from seeking a remedy under Section 208 of the Act for damages based on a carrier's reported overearnings.[29] We stated that

> we are not persuaded by defendants' claims that earning in excess of a prescribed rate of return does not violate that Act or, if it does, that the Commission *is required* to take a carrier's underearnings as well as its overearnings into account in determining whether a violation has occurred.
>
> * * * * * *
>
> We find that a valid prescription bound the defendants to a maximum earnings limitation, and the defendants admit that they earned in excess of the amount during the period in question.[30]

We found further that *AT&T v. FCC* did not govern Section 208 complaint proceedings. The Commission has the authority to order a carrier to pay damages if a complainant meets the burden of establishing both a violation of the Act and the actual injury.[31]

15. In addition, we have previously held that enforcement of a rate of return prescription is not retroactive ratemaking because the obligation being enforced was set prospectively when the prescription was adopted.[32] Defendants have not persuaded us to alter our decision. We have also rejected the contention that rates charged in conformity with a lawfully filed tariff cannot be unjust and unreasonable.[33] We point out that the issue is not the lawfulness of high profits in the abstract, but the lawfulness of profits in excess of a prescription. Accordingly we hold that, taking into account the buffer, profits in excess of a prescription are unjust and unreasonable.

16. *Statute of Limitations:* WTG is correct in its assertion that it had until September 30, 1989 to file its complaints based on monitoring reports filed by defendants with the Commission on September 30, 1987.[34] We have previously held that the date of the filing of the final monitoring report is dispositive with regard to the date a complainant discovers the right or wrong or the facts on which such knowledge is chargeable as a matter of law.[35] Defendants have made no argument that persuades us to alter this holding. Section 415 does not bar WTG's complaints.

17. *Ohio Bell:* We disagree with the defendants' claim that *Ohio Bell* and *AT&T v. FCC* compel us to dismiss WTG's complaints. As we emphasized in the *MCI Liability Order* and reaffirmed in the *MCI Damages Order*, automatic refunds and refunds ordered under Section 204 of the Act are different from individual actions for damages under Section 208. Unlike the automatic refund mechanism in *AT&T v. FCC* or the refund procedure in *Ohio Bell*, both of which resulted from rulemaking proceedings initiated at the Commission's discretion, individual actions for damages under Section 208 are initiated by private parties seeking damages for injuries to themselves; those private parties have the burden of establishing both a violation of the Act and actual injury.[36] The courts in *AT&T v. FCC* and *Ohio Bell* did not discuss private complaints for damages; they did not invalidate private actions for damages; and their holdings are not applicable to the different separately authorized complaint procedures set forth in Sections 206-209. Accordingly, those decisions do not require us to depart from our holding in the *MCI Liability Order* that defendants have violated the Communications Act by earning in excess of a valid rate of return prescription, thereby making their rates unjust and unreasonable under Section 201 of the Communications Act and themselves liable for damages to the extent a complainant can establish that it was damaged as a result of the violation.[37]

B. Damages and Interest Claims

18. WTG's damages claims rest primarily on the contention that the proper measure of damages it incurred as a result of the defendants' rate of return prescription violations is the difference between the amount it actually paid the defendants for interstate access services during the October 1, 1985 through December 31, 1986 monitoring period and the amount it would have paid if the defendants' rates produced earnings that did not exceed the Commission's prescription. The defendants, however, have raised a number of challenges to WTG's damages claims, including a number of arguments that were previously considered and rejected by the Commission in the *MCI Liability Order* and the *MCI Damages Order*.[38] We address the parties' contentions below.

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[29] *MCI Liability Order*, 5 FCC Rcd at 222-3.

[30] *MCI Liability Order*, 5 FCC Rcd 223 [emphasis in the original].

[31] *Id.*

[32] *Id.* at 222.

[33] *Id.*

[34] WTG cites to the Bureau's Show Cause Orders in both the AT&T and MCI proceedings to support its argument. *See, e.g.*, MCI Telecommunications Corp. v. The Chesapeake and Potomac Telephone Companies, et al., *Order to Show Cause*, 4 FCC Rcd 6107, 6108, n.8. This holding was subsequently adopted by the Commission. *See MCI Liability Order*, 5 FCC Rcd at 224-25.

[35] In the *MCI Liability Order* we stated:

> the defendants filed the rate of return monitoring reports which...were developed by the Commission for several purposes, including making information about carrier earnings public[ly] available. Moreover, the monitoring reports relied on by MCI in its complaints were specifically designated by the Commission as a "final" and conclusively binding determination of a carrier's earnings.

5 FCC Rcd at 225. We note further that, we have held that Section 415(e) is inapplicable to the type of complaints we deal with here. Section 415(e) concerns a carrier's liability to its customers for failure to transmit a message in accordance with its common carrier obligations. The instant complaints deal with the lawfulness of defendants' rates, not defendants' transmissions or obligations to transmit messages properly. *See MCI Reconsideration Order*, 5 FCC Rcd at 3464.

[36] *See MCI Liability Order*, 5 FCC Rcd at 222-23, para. 55.

[37] *Id.* at 226, para. 86.

[38] The issues and arguments raised by the defendants in response to WTG's claims are essentially identical. For the sake of convenience and clarity, we will refer to defendants' arguments

1. Damages

a. Contentions of the Parties

19. As referenced above, WTG's damages claims rest primarily on the contention that the proper measure of the damages it incurred as a result of defendants' violations is the difference between the amount it actually paid defendants for interstate access services during the October 1, 1985 through December 31, 1986 period and the amount it would have paid if the defendants' rates had produced earnings that did not exceed the Commission's prescribed rate of return. In its briefs, WTG contends that the defendants' calculations are internally inconsistent and unresponsive to the information requested. WTG states that the defendants did not calculate the amounts WTG would have paid had defendants' rates been set at a level to produce earnings at the prescribed rate of return. WTG asks that we reject the defendants' submissions and direct the defendants to provide information necessary to compute the difference between the amount WTG actually paid and the amount it would have paid during the relevant monitoring period.

20. In defense of their submissions in response to WTG's interrogatories, defendants state that they provided the necessary calculations to determine the amount by which earnings for certain categories of access services exceeded the prescribed level of 13.25%. The defendants further state that they even calculated the percentage of their revenues represented by WTG's billed revenues and then applied that percentage to the earnings in categories with a return above 13.25%. According to the defendants, in order to satisfy WTG's specific requests of what their rates would have been to produce earnings at the Commission's prescribed levels, they would have had to repeat the ratemaking process from the beginning to develop rates projected to earn at the authorized level.[39] Defendants argue that such calculations would be an exercise in pure speculation.

21. The defendants also challenge WTG's damages claims on a number of grounds, raising several arguments that were previously considered and rejected by the Commission in the *MCI Liability Order* and the *MCI Damages Order*. Defendants contend that by simply basing its damages claims on a calculation of WTG's prorated share of category-level overearnings, WTG asks the Commission to award it damages in the same amounts it would have received under the automatic refund rule invalidated by the court in *AT&T v. FCC*.[40] The defendants maintain that such a result is expressly precluded by *AT&T v. FCC*. NWB add that the decision in *Ohio Bell* precludes an award of damages based solely on category level overearnings.

22. Defendants next contend that, even if *AT&T v. FCC* and *Ohio Bell* do not preclude WTG's damages claims, the claims still fail because WTG's complaints do not establish a valid cause of action. According to NWB, to pursue a damages claim, WTG must first show that the defendants charged unjust and unreasonable rates for interstate access services during the period in question, not that defendants' rates produced excessive returns in individual service categories.[41] Moreover, SWBT argues, Section 206 of the Act[42] requires WTG to prove injury, causation, and the amount of damages in addition to establishing a violation of the Act.[43] Defendants maintain that by simply referencing defendants' earned rates of return for individual access service categories, WTG has not only failed to allege any facts that would establish that defendants' rates were unjust and unreasonable during the period in question but has also failed to show that it sustained actual damage as a result of those rates.[44]

23. The defendants each raise distinct arguments to support their claims that an award of damages to WTG based on carrier overearnings is inappropriate for equitable and policy reasons. NWB vigorously argues that WTG is actually seeking restitution or a refund of tariffed charges, not damages. NWB argues that regardless of how WTG characterizes the relief it seeks, any form of refund or restitution to WTG would be contrary to the public interest.[45] NWB further contends that an award of damages would be inequitable because (i) NWB's total corporate rate of return would be driven below the confiscatory level;

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as if they are part of the same pleading. To the extent that the defendants raise separate or unique arguments, we will address them separately.

[39] *See, e.g.*, C&P/NJB RBr. at 4.

[40] *See, e.g.*, USWC Br. at 4-6.

[41] USWC argues that WTG must specify an identifiable rate that it paid that was too high or too low. USWC Br. at 11. In addition, USWC cites to a 1970 circuit court decision to support its claim that where retroactive relief is ordered for rates paid pursuant to a tariff that is subsequently found unjust and unreasonable, the Commission must determine what a just and reasonable rate is. *Id.*, citing to *Middlewest Motor Freight Bureau v. United States*, 433 F.2d 212, 232 (8th Cir. 1970) (*Middlewest*), *cert. denied*, 402 U.S. 999 (1971). As we determined in the *MCI Damages Order*, USWC's reliance on *Middlewest* is misplaced. *MCI Damages Order* at n.56.

[42] *See* 47 U.S.C. § 206.

[43] SWBT Br. at 1.

[44] *See, e.g.*, USWC Br. at 12. USWC contends that the principle that WTG must still prove it was damaged and in what amount was established by the Supreme Court in *Southern Ry. Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 454-55 (1979) (*Seaboard*), in construing relevant sections of the ICA. The Court stated:

> [O]ur sole concern is the Commission's decision not to investigate under § 15(8)(a) [204], a decision that has only two final consequences. First, the burden of proof with regard to *reasonableness* is placed on the shipper under § 13(1) [208] rather than on the carrier, who would have borne it in a § 15(8)(a) [204] proceeding. (With respect to all other aspects of lawfulness, however, the burden is borne by the shipper in both proceedings.) Second, the shipper's relief, if unlawfulness is proved, is limited under § 13(1) [208] to actual damages rather than the full refund of overcharges available under § 15(8)(a) [204].

USWC states that this ruling has been found applicable to proceedings under the Communications Act. *See Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221, 1235 n.35 (D.C. Cir. 1980) (*ARINC*), *cert. denied*, 451 U.S. 920 (1981). Here too, as we determined in the *MCI Damages Order*, USWC's reliance on case precedent is misplaced. *MCI Damages Order* at n.59.

[45] USWC Br. at 13-19. USWC argues WTG must plead its case in equity and the Commission may only award a refund/damages if we find that the public interest will be served by a refund/damages award to WTG. USWC contends that the leading case in this area is *Moss v. Civil Aeronautics Board*, 521 F.2d 298 (D.C. Cir. 1975) (*Moss*), *cert. denied sub nom. Roberts*

(ii) there was uncertainty surrounding the tariff filings during the relevant period; and (iii) WTG would receive a windfall that would be inconsistent with sound equitable principles.[46]

24. WTG counters that defendants' threshold arguments regarding the effect of the court's ruling in *AT&T v. FCC* have largely been rejected or precluded by the *MCI Liability Order*.[47] WTG states that defendants' arguments that it has failed to allege and prove violations of the Act and actual damage are unfounded because it has made a sufficient showing of each under traditional principles governing its statutory right to such relief. According to WTG, the only injury and causation it need show are the injury and causation arising from its payment of excessive rates for services it purchased from defendants during the relevant period. WTG maintains that it has shown that defendants charged it rates that produced earnings in excess of the Commission's prescribed rate of return and argues that its damages are the excessive charges that WTG paid.[48]

25. Finally, WTG argues that unlike Section 204 of the Act, Section 206 does not grant the Commission discretion in awarding damages. WTG contends that the defendants' offset arguments should be rejected because the Commission does not have the authority to forgive violations of the Act. WTG contends that, even if taken into account, any equitable considerations weigh in its favor rather than in the favor of the defendants. According to WTG, denial of relief to WTG would result in a windfall to defendants for its wrongdoing and complainants like WTG would be without recourse to damages.

b. Discussion

26. As an initial matter, we find that the calculations submitted by the defendants are sufficient for a determination of damages by WTG. In the *Discovery Order*, the Bureau stated that it tended to agree, in principle, that a possible measure of the damages stemming from defendants' rate of return violations could be the difference between the rates WTG actually paid for defendants' interstate access services and the rates it would have paid if defendants' rates had produced earnings within the authorized levels.[49] The Bureau was not persuaded on the record before it, however, that a damages determination based solely on such a measure necessarily reflected actual damages incurred by WTG.[50] The defendants were invited to submit evidence that could serve to mitigate or otherwise reduce WTG's damages claims. Specifically, the Bureau stated that evidence demonstrating that WTG's share of excessive earnings realized in a particular access category by a defendant could be offset or otherwise reduced due to facts and circumstances surrounding WTG's purchase of other interstate access services from such defendant for the relevant monitoring period might be relevant.[51]

27. *AT&T v. FCC and Ohio Bell:* The defendants' claims that the holdings in *AT&T v.FCC* and *Ohio Bell* control these proceedings and bar an award of damages to WTG are without merit for the reasons stated in both the *MCI Liability Order* and the *MCI Damages Order*. In the liability section above, we again emphasized that the court in *AT&T v. FCC* explicitly acknowledged the Commission's authority to order a carrier to disgorge earnings in excess of a rate of return prescription,[52] finding only the remedy component of the Commission's rate of return prescription (the automatic refund mechanism) to be unlawful.[53] More to the point, we emphasized that "the [*AT&T v. FCC*] opinion does not address Section 208 complaint proceedings nor purport to alter the statutory scheme of the Act or the remedies Congress established therein."[54] Similarly, as we stated in the *MCI Damages Order*, the *Ohio Bell* decision does not expand upon *AT&T v. FCC* and does not address the Commission's authority to award damages in private complaint actions under Section 208 of the Act.[55]

28. *Section 201(b) of the Act:* We turn now to the defendants' contention that WTG's damages claims must be dismissed because WTG has failed to prove defendants' rates were unjust and unreasonable within the meaning of Section 201(b) of the Act. In the liability section above, we held that the complainant met its burden of proof by establishing that the defendants violated our rate of return prescription.[56] Accordingly, the question before us now is not whether defendants' rates were unjust and unreasonable; rather the question now is whether the complainant suffered any measurable damage as a consequence of paying rates previously determined by the Commission to be unlawful under Section 201(b).

29. The defendants next claim, that even if WTG has sustained its burden and shown that defendants' rates were unjust and unreasonable, its damages claims must still fail because judicial precedent compels WTG to establish what a just and reasonable rate would have been as a prerequisite to pursuing damages claims based on unreasonable rates,[57] has previously been discussed and rejected by the Commission. In the *MCI Damages Order* we reemphasized[58] the Commission's authority to prescribe and enforce carriers' rates of return, pointed out that the issue in these proceedings is not whether individual rates are unlawful, but whether cumulative rates that produced earnings over and above a prescribed rate of return are

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v. Civil Aeronautics Board, 424 U.S. 966 (1976), *reh'g denied*, 425 U.S. 966 (1976). USWC states that the refund in *Moss* "was governed by the equitable principles governing the law of restitution." USWC Br. at 14, citing to *Moss*, 521 F.2d at 304. We addressed this argument in the *MCI Damages Order* and found USWC's reliance on *Moss* to be misplaced. *MCI Damages Order* at n.60.

[46] USWC Br. at 17-19.

[47] WTG RBr. at 2-3.

[48] *Id.* at 3-4.

[49] *Discovery Order*, 7 FCC Rcd at 3582, para. 6.

[50] *Id.*

[51] *Id.*

[52] *AT&T v. FCC*, 836 F.2d at 1392 ("Thus, as we previously have concluded, the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate of return prescription").

[53] Indeed, the court in *Ohio Bell* recognized the continuing efficacy of our rate of return framework. *See* 949 F.2d at 868.

[54] *MCI Liability Order*, 5 FCC Rcd at 223, para. 56.

[55] *MCI Damages Order* at para. 26.

[56] In the *MCI Liability Order*, we held that the complainant therein could prove that defendants' rates were unjust and unreasonable by proving that the defendants violated our rate of return prescription. *See MCI Liability Order*, 5 FCC Rcd at 226.

[57] USWC Br. at 11, citing *Middlewest*, 433 F.2d 212, 232.

[58] For a full discussion of the Commission's authority to prescribe and enforce carriers' rates of return, *see MCI Liability Order*, 5 FCC Rcd at 222-223.

unjust and unreasonable, and agreed with the Bureau's determination in the *Discovery Order* that a proper starting point for assessing damages based on violations of a rate of return prescription is to look at the difference between the amount complainant paid for defendants' interstate access services and the amount it would have paid if defendants had charged rates that produced returns within the Commission's prescribed levels.[59] We said, "[i]t is appropriate and consistent with the Commission's rate of return regulatory scheme to inquire as to earnings in excess of prescribed levels for purposes of assessing damages claims."[60] WTG has shown that it purchased services from defendants at rates that produced earnings over and above the defendants' prescribed levels. We previously determined in the *MCI Liability Order* that a violation of such a prescription constitutes a violation of the Act for which damages may lie.

30. *Damages and Offsets:* The defendants' arguments are devoted primarily to attempting to persuade the Commission that WTG's damages claims are really claims for restitution or refunds governed by equitable or public policy considerations. These considerations, according to defendants, militate against any award of damages to WTG based on excessive earnings. The defendants argue, in effect, that the damages WTG seeks are equivalent to refunds that would have been required under the refund mechanism invalidated by the court in *AT&T v. FCC*. We do not agree. We are concerned here with determining whether a particular customer, which has availed itself of a statutory complaint remedy under Title II of the Act, has sustained any measurable damage that can be traced to defendants' violations of the Act. Although a damages award under Section 208 of the Act might well be equal or substantially similar to a refund ordered under Section 204 of the Act,[61] this does not transform a private complaint action into a public enforcement proceeding subject to broad public interest considerations.

31. In addition, we reject NWB's contention that a damages award to WTG is precluded because it would drive USWC's overall rate of return for USWC in the aggregate below the minimum necessary to raise capital to confiscatory levels. Assuming *arguendo*, that such an inquiry is relevant to a Section 208 damages claim, USWC has failed to provide sufficient record evidence for the Commission to assess the impact of any damages award upon its overall interstate rate of return. While NWB has provided some data in Exhibit A to its brief,[62] these data made no clear showing of the amount by which an award to WTG would reduce USWC's overall interstate earnings or rate of return let alone that any such reduction would be confiscatory. For the reasons stated in the *MCI Damages Order*,[63] we find NWB's other equitable arguments regarding the uncertainty surrounding tariffffilings during the 1985-86 period and an alleged windfall to WTG should it receive restitution equally unavailing.

32. We reject WTG's claim that we have no discretion to allow offsets in awarding damages. The issue of damages to a particular complainant is separate and apart from the validity and effect of our rate of return prescription. The determination we make here is the extent to which complainant suffered damage on account of defendants' violations of the rate of return prescription. The question of offsets is relevant to that determination and no other.

33. We do find the defendants' claims for offsets to be persuasive. We have carefully reviewed the arguments and evidence presented by the parties and believe that some offset to the claimed damages amounts is appropriate. In the *MCI Liability Order*, we specifically rejected claims by the defendants that the Commission is required to take a carrier's interstate access underearnings as well as overearnings into account in determining whether a violation of the Act has occurred because this would be at odds with established case law.[64] However, we stated in the *MCI Damages Order* that it is appropriate to consider defendants' underearnings in assessing complainant's damage, or injury, resulting from defendants' overearnings in a particular monitoring period[65] and rejected the complainant's contention that this approach results in unlawful cross-subsidization.[66] The parties have made no argument which persuades us to alter our holdings.

34. We award no damages to WTG from The Chesapeake and Potomac Telephone Companies.[67] In reaching this determination, we have accepted C&P's calculation of its overearnings in the switched traffic sensitive category and of WTG's share of overearnings and underearnings at the three rate of return levels. Based upon our review of the calculations provided by C&P, it is entitled to offset its overearnings in the switched traffic sensitive category with WTG's prorated share of C&P's underearnings in the common line category, which reduces WTG's base damage award to zero.

35. We award no damages to WTG from New Jersey Bell Telephone Company. WTG and NJB were not able to reach agreement upon the amount of switched traffic sen-

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[59] *MCI Damages Order* at para. 29.

[60] *Id.*

[61] *See Seaboard*, 442 U.S. 444, 455, n.8:

> If a shipper proves a rate is unreasonable and that he was damaged in the full amount he was overcharged, the outcome of a § 13(1) [§ 208] proceeding will be no different than that of a § 15(8)(a) [§ 204] proceeding in which the carrier fails to establish the reasonableness of the rate.

[62] Exhibit A contains a summary and compilation of information submitted in NWB's Form 492 for the relevant monitoring period, a calculation of how much money USWC would have earned if its entire carrier enterprise earned exactly at a 12.75% rate of return, and the same calculation at a 13.10% rate of return.

[63] *MCI Damages Order* at para. 32.

[64] *MCI Liability Order*, 5 FCC Rcd at 223, paras. 59-60, citing *Nader v. FCC*, 520 F.2d 182, 201 (D.C. Cir. 1975). *See also New England Telephone and Telegraph Co. v. FCC*, 826 F.2d 1101 (D.C. Cir. 1987), *cert denied*, 109 S.Ct. 1942 (1989); and *AT&T v. FCC*.

[65] *MCI Damages Order* at para. 38.

[66] *Id.* at para. 39.

[67] This amount is calculated as follows:

$ 25	(overcharges)
- 203	(undercharges to WTG)
$ 0	Damages

sitive services purchased by WTG.[68] In addition, NJB underearned in the common line access category and would presumably argue that it would be entitled to an offset. Given that WTG or NJB were not able to provide a more accurate calculation of switched traffic sensitive services purchased by WTG, we have no basis upon which to award damages.

36. We award damages to WTG from Northwestern Bell Telephone Company in the amount of $5,000. In reaching this amount, we accepted NWB's calculation of its overearnings in the states where WTG purchased special access service: Iowa, Minnesota and Nebraska. We note that WTG does not dispute NWB's calculations. Under these circumstances, we will accept NWB's claim that WTG's base damage award is $5,000.

2. Interest on Damages Awards

a. Contentions of the Parties

37. Defendants' final claim is that WTG is not entitled to prejudgment interest should the Commission award damages to WTG. Defendants contend that while the Commission may award interest under Section 204 of the Act, there is no provision for the award of interest under Section 206 of the Act. Because we cannot lawfully grant WTG a refund, NWB argues, we may not award interest.[69]

38. WTG disputes defendants' claims that it is not entitled to prejudgment interest in connection with any ultimate damages award. WTG contends that an award of prejudgment interest is appropriate in the instant case because defendants could ascertain with sufficient certainty the amount of WTG's damages.[70] WTG argues that the Commission has the authority under Section 4(i) of the Act[71] to award interest. WTG further contends that an award of damages would make it whole.

b. Discussion

39. The defendants' claim that the Commission lacks authority to award interest in a Section 208 common carrier complaint proceeding has no merit. Although Section 208 of the Communications Act does not explicitly authorize an award of interest, our authority under Sections 4(i) and other sections of the Act to award interest in a common carrier complaint case is well established.[72] In deciding whether to award interest in a particular common carrier complaint case we are generally guided by federal court practice, where the award of prejudgment interest "... is a matter left to the sound discretion of the trial court."[73] The award of interest in a common carrier complaint case is thus guided by considerations of fairness. Applying this standard, we are persuaded that an award of interest is appropriate in these cases. WTG was effectively deprived of the use of the excessive amounts it paid defendants as a result of their unlawful rates while the defendants, on the other hand, enjoyed the beneficial use for a substantial period of time of funds to which WTG rightfully has a claim. We are persuaded that interest is required not only to effect a full and fair remedy for WTG, which paid rates higher than it would have paid had defendants earned within the prescribed level, but also to avoid any unjust enrichment of defendants stemming from their charging rates that we have determined to be unjust and unreasonable under Section 201(b) of the Act.[74] We conclude that interest should be computed at the IRS rate for tax refunds.[75] In addition, we find that interest should begin to accrue from January 1, 1987, the day after which the 1985-1986 monitoring period ended. At that point, defendants were subject to the earnings limitations of a new monitoring period. Accordingly, we award interest calculated at the IRS rate for tax refunds[76] from Northwestern Bell Telephone Company to Williams Telecommunications Group, Inc. from January 1, 1987 until the date of full payment to Williams Telecommunications Group, Inc.

IV. CONCLUSION

40. We have carefully reviewed the extensive record before us and have found, to the extent indicated here, that complainant is entitled to an award of damages, plus accumulated interest on such damages, for Northwestern Bell Telephone Company's violations of our rate of return prescription for the 1985-1986 monitoring period.

V. ORDERING CLAUSES

41. Accordingly, IT IS ORDERED, pursuant to Section 4(i), 4(j), 201, 206, 207, 208 and 209 of the Communications Act, as amended, 47 U.S.C. §§ 4(i), 4(j), 201, 206, 207, 208 and 209, that the above-captioned complaints filed by Williams Telecommunications Group, Inc. ARE GRANTED to the extent discussed here.

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[68] The parties were only able to ascertain that WTG subsidiary LDX NET, Inc. purchased less than $1,000 dollars of switched traffic sensitive access services from NJB.

[69] USWC Br. at 12-13.

[70] WTG RBr. at 6.

[71] 47 U.S.C. § 4(i).

[72] *See* MCI Telecommunications Corporation v. American Telephone and Telegraph Company, *et al.*, 94 FCC 2d 332, 343-46 (1983).

[73] *United States v. California Board of Equa lization*, 650 F.2d 1127, 1132 (9th Cir. 1981), *aff'd*, 456 U.S. 901 (1982), *reh'g denied*, 456 U.S. 985 (1982).

[74] *See New England Telephone and Telegraph Co. v. FCC*, 826 F.2d 1101, 1113 (D.C. Cir. 1987), *cert. denied*, 109 S. Ct. 1942 (1989) (carriers may reasonably be required "to pay full interest for earnings they had no right to retain in the first place.").

[75] We believe that the rationale adopted by the Commission for applying the IRS rate in pole attachment complaint proceedings under Section 204 of the Act, 47 U.S.C. § 204, is equally applicable here. In Teleprompter of Fairmont v. C&P of West Virginia, 79 FCC 2d 232 (1980), the Commission stated

> As a matter of fairness, we believe that the rate of interest applied in a pole attachment complaint proceeding should be readily available, easily applied, and periodically revised to reflect changes in borrowing costs. In light of these considerations, we find the interest rate for federal tax refunds and additional tax payments suitable for use in this type of proceeding. This rate appears in a variety of easily obtained official and commercial publications, and is revised on a regular basis. [Footnote omitted.]

[76] The applicable IRS rates are set forth in Appendix A.

42. IT IS FURTHER ORDERED that Northwestern Bell Telephone Company SHALL PAY the sum of $5,000 (five thousand dollars) within 60 days after the release date of this Memorandum Opinion and Order.

43. IT IS FURTHER ORDERED that Northwestern Bell Telephone Company SHALL PAY interest on the amount of damages assessed at the IRS rates set forth in Appendix A from January 1, 1987 until the date full payment is made.

44. IT IS FURTHER ORDERED that the Supplement to Motion to Dismiss filed by Northwestern Bell Telephone Company on February 13, 1992 IS ACCEPTED for filing.

45. IT IS FURTHER ORDERED that the Motion to Dismiss filed by Northwestern Bell Telephone Company on December 11, 1989 IS DENIED.

46. IT IS FURTHER ORDERED that the Motions to Dismiss filed by The Chesapeake and Potomac Telephone Companies and New Jersey Bell Telephone Company on November 22, 1989 and on July 21, 1992 ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Effective Period	Rate	Internal Revenue Service Citation
01/01/87 - 03/31/87	8%	Rev.Rul. 146, 1986-2 C.B. 208
04/01/87 - 06/30/87	8%	Rev.Rul. 87-23, 1987-13 I.R.B. 46
07/01/87 - 09/30/87	8%	Rev.Rul. 87-62, 1987-29 I.R.B. 10
10/01/87 - 12/31/87	9%	Rev.Rul. 87-87, 1987-36 I.R.B. 8
01/01/88 - 03/31/88	10%	Rev.Rul. 87-131, 1987-50 I.R.B. 6
04/01/88 - 06/30/88	9%	Rev.Rul. 88-17, 1988-10 I.R.B. 6
07/01/88 - 09/30/88	9%	Rev.Rul. 88-50, 1988-25 I.R.B. 39
10/01/88 - 12/31/88	10%	Rev.Rul. 88-86, 1988-41 I.R.B. 1
01/01/89 - 03/31/89	10%	Rev.Rul. 88-105, 1988-51 I.R.B. 4
04/01/89 - 06/30/89	11%	Rev.Rul. 89-36, 1989-1 C.B. 309
07/01/89 - 09/30/89	11%	Rev.Rul. 89-69, 1989-1 C.B. 310
10/01/89 - 12/31/89	10%	Rev.Rul. 89-99, 1989-2 C.B. 256
01/01/90 - 03/31/90	10%	Rev.Rul. 89-125, 1989-2 C.B. 257
04/01/90 - 06/30/90	10%	Rev.Rul. 90-19, 1990-1 C.B. 186
07/01/90 - 09/30/90	10%	Rev.Rul. 90-47, 1990-1 C.B. 187
10/01/90 - 12/31/90	10%	Rev.Rul. 90-71, 1990-35 I.R.B. 4
01/01/91 - 03/31/91	10%	Rev.Rul. 90-94, 1990-46 I.R.B. 16
04/01/91 - 06/30/91	9%	Rev.Rul. 91-20, 1991-11 I.R.B. 1
07/01/91 - 09/30/91	9%	Rev.Rul. 91-33, 1991-21 I.R.B. 1
10/01/91 - 12/31/91	9%	Rev.Rul. 91-50, 1991-37 I.R.B. 1
01/01/92 - 03/31/92	8%	Rev.Rul. 91-65, 1991-51 I.R.B. 1
04/01/92 - 06/30/92	7%	Rev.Rul. 92-21, 1992-14 I.R.B. 14
07/01/92 - 09/30/92	7%	Rev.Rul. 92-44, 1992-24 I.R.B. 86
10/01/92 - 12/31/92	6%	Rev.Rul. 92-77, 1992-38 I.R.B. 12

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN SHARECOM, INC.,
Complainant,

v.

MICHIGAN BELL TELEPHONE COMPANY,	File No. E-91-131
PACIFIC BELL TELEPHONE COMPANY, and	File No. E-91-132
WISCONSIN BELL, INC.,	File No.E-91-134

Defendants.

MEMORANDUM OPINION AND ORDER

Adopted: January 29, 1993; Released: February 24, 1993

By the Commission:

TABLE OF CONTENTS

Topic	Paragraph No.
I. INTRODUCTION	1
II. BACKGROUND	2 - 6
III. DISCUSSION	7 - 51
A. Liability for Damages	7 - 20
1. Contentions of the Parties	7 - 14
2. Discussion	15 - 20
B. Damages and Interest Claims	21 - 51
1. Damages	21 - 48
a. Contentions of the Parties	22 - 35
b. Discussion	36 - 48
2. Interest on Damages	49 - 51
a. Contentions of the Parties	49 - 50
b. Discussion	51
IV. CONCLUSION	52
V. ORDERING CLAUSES	53 - 55

I. INTRODUCTION

1. In this Memorandum Opinion and Order we find that the complainant in these consolidated Section 208 proceedings,[1] American Sharecom, Inc. (American Sharecom), has met its burden of establishing that the defendant local exchange carriers (LECs) have violated Section 201(b) of the Communications Act by earning in excess of the rate of return for interstate access services prescribed by the Commission for the period January 1, 1987 through December 31, 1988. In addition, we award American Sharecom damages and interest in the amounts specified below.

II. BACKGROUND

2. The case presented by the complainant is virtually identical to that presented by the complainant in *MCI Telecommunication Corporation v. Pacific Northwest Bell Telephone Co., et al.*[2] In that proceeding, we held that LEC rates that produced earnings in excess of a Commission prescription were unjust and unreasonable within the meaning of Section 201(b) of the Communications Act.[3] We also held that a complainant/customer is entitled to recover damages to the extent that it can show that it suffered actual damage as a consequence of such violations. Subsequently, in the damages phase of the proceeding, we held that MCI had properly shown that it had been harmed by paying the defendants' rates that produced the excessive earnings and awarded the complainant monetary damages, plus interest computed at the IRS rate.[4]

3. A detailed accounting of the Commission's rate of return regulatory scheme as well as relevant Commission and court decisions is set forth in the *MCI Liability Order* and the *MCI Damages Order*[5] and will not be repeated at length here. However, a brief discussion of the development and implementation of the Commission's rate of return prescription is helpful to our analysis of the instant complaints.

4. Following the divestiture of the former Bell system and the concurrent development of the access charge system,[6] the Commission prescribed a rate of return system for all eight entities that emerged after divestiture (i.e., AT&T and the Seven Regional Bell Holding Companies)

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[1] While American Sharecom filed separate complaints against the named defendants, the proceedings have been consolidated for disposition due to the similarity of the issues and arguments raised by the parties.

[2] *MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co., et al.*, 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon. denied*, 5 FCC Rcd 3463 (1990) (*MCI Reconsideration Order*) (jointly *MCI Orders*), *appeal dismissed sub nom. Mountain States Tel. and Tel. Co., et al. v. FCC*, 951 F.2d 1259 (10th Cir. 1991) (per curiam). *See also, American Telephone and Telegraph Co. v. Northwestern Bell Telephone Co.*, 5 FCC Rcd 143 (1990) (*AT&T Liability Order*), *appeal dismissed sub nom. Mountain States Tel. and Tel. Co., et al. v. FCC*, 951 F.2d 1259. (10th Cir. filed March 6, 1990).

[3] *MCI Liability Order* at 216-17. Section 201(b), 47 U.S.C. § 201(b), provides that "[a]ll charges, practices, classifications, and regulations for and in connection with ... communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful."

[4] MCI Telecommunications Corporation v. Pacific Bell Telephone Company, *et al.*, FCC 93-70 (released February 8, 1993) (*MCI Damages Order*).

[5] *MCI Liability Order*, 5 FCC Rcd at 217-218; *MCI Damages Order* at paras. 2-3.

[6] The Commission has prescribed for all local exchange carriers, including the defendants, a methodology known as the "access charge system," which carriers are required to follow in tariffing their interstate services. The system determines, inter alia, the carriers' overall rate structure and the allocation of

and approximately 1400 other local exchange carriers as well. In a broad rulemaking proceeding, the Commission adopted: (1) methodologies to be used to prescribe maximum rates of return; (2) procedures for represcribing rates of return on a regular basis; (3) a system of monitoring carriers' earnings; and (4) a requirement that overearnings be refunded, either directly to those who had paid rates that produced the overearnings, or pursuant to automatic, prospective adjustments to tariff rates.[7] For the 2-year time period at issue in the instant complaints, January 1, 1987 through December 31, 1988, local exchange carriers, including the defendants, were required to file rates calculated to earn a 12 percent rate of return for overall interstate access.[8] In accordance with the Commission's "buffer" policy, carriers were given notice that 12.25 percent would be the maximum allowable rate of return on overall interstate earnings and that 12.40 percent would be the maximum allowable rate of return for any access service category.[9] The buffer[10] would be used to determine whether the prescription had been violated.[11]

5. In January 1988, the U.S. Court of Appeals for the District of Columbia Circuit set aside the automatic refund mechanism as arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce."[12] The court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate of return prescription."[13]

6. In February 1988, MCI filed formal complaints against a number of LECs alleging violations of the Commission's rate of return prescription for the October 1, 1985 through December 31, 1986 monitoring period and requesting monetary damages. American Sharecom filed similar complaints in September 1989, also seeking damages for alleged rate of return prescription violations for the initial 1985-1986 monitoring period. During the same time period, numerous similar complaints were filed by other interstate access customers alleging rate of return prescription violations for the initial 15-month monitoring period.[14] In January 1990, the Commission released its *MCI Liability Order* granting MCI's complaints and directing MCI to file supplemental complaints for damages. In September 1991, American Sharecom filed a second round of complaints against the defendant LECs alleging violations of the Commission's prescription for the January 1, 1987 through December 31, 1988 monitoring period.[15] It is this second round of complaints that is the subject of this Memorandum Opinion and Order. In October 1991, the Commission placed all pending rate of return complaints, including MCI's supplemental complaints for damages, in abeyance pending resolution of a related court remand in *Illinois Bell Tel. Co. v. FCC*, 911 F.2d 776 (D.C. Cir. 1990).[16] Following the return of the proceedings to active status in December 1991 and the completion of

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costs within that structure, and was in effect during the period covered by the complaints. The access charge system is codified in Part 69 of the Commission's rules. *See* 47 C.F.R. § 69.1 *et seq.* (1988). These rules were developed in a proceeding that was the subject of numerous challenges on appeal. With a few exceptions not relevant to the instant complaint proceedings, these appeals were denied by the D.C. Circuit. *See NARUC v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985).

[7] *See* Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Carriers, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), (Phase I Order), *on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,103 (Apr. 1, 1986) (Phase I Reconsideration); *on further reconsideration*, 2 FCC Rcd 190 (1987). *See also*, Procedures and Methodologies to Establish Reporting Requirements, CC Docket No. 86-127, FCC 86-514 (released Dec. 3, 1986), 52 Fed. Reg. 273 (Jan. 5, 1987).

[8] *See* Authorized Rate of Return for the Interstate Access Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase III, FCC 86-354, 51 Fed. Reg. 32,920 (Sept. 17, 1986), *recon. denied*, 2 FCC Rcd 5636 (1987). *See also*, Procedures and Methodologies to Establish Reporting Requirements, CC Docket No. 86-127, FCC 86-514 (released Dec. 3, 1986), 52 Fed. Reg. 273 (Jan. 5, 1987).

[9] 47 C.F.R. § 65.700.

[10] *See MCI Liability Order*, 5 FCC Rcd at 217:

> ... the Commission established both an authorized rate of return and a 'spread' or 'buffer' above that return for use in proceedings relating to the enforcement of the prescription. In other words, the authorized return would be employed in computing tariff rates; the spread, or buffer, would be used in combination with the authorized return 'to determine whether a rate of return prescription had been violated.' [footnote omitted.]

[11] *See Phase I Order*, 50 Fed. Reg. at 41,352 (para. 21).

[12] *American Telephone & Telegraph Co. v. FCC*, 836 F.2d 1386, 1390 (D.C. Cir. 1988) (*AT&T v. FCC*). For a detailed discussion of *AT&T v. FCC*, *see MCI Liability Order*, 5 FCC Rcd at 221-223.

[13] *AT&T v. FCC*, 836 F.2d at 1392.

[14] These additional complaints are being dealt with in separate Section 208 complaint proceedings.

[15] One of the complaints has since been settled. *See* American Sharecom, Inc. v. GTE Northwest Incorporated, 7 FCC Rcd 8536 (Com.Car.Bur. 1992). The remaining defendants are Michigan Bell Telephone Company and Wisconsin Bell, Inc., (collectively "Ameritech"); and Pacific Bell Telephone Company (Pacific Bell).

[16] *See* American Sharecom, Inc. v. Michigan Bell Telephone Co. and Wisconsin Bell Telephone Co., Inc., Notice of Formal Complaint (October 28, 1991) and American Sharecom, Inc. v. Pacific Bell Telephone Co., Notice of Formal Complaint (October 28, 1991). The Commission acted on the remand in October 1991. *See* Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, CC Docket No. 86-497, 7 FCC Rcd 296 (1991), *appeal docketed sub nom. Illinois Bell Telephone Co., et al. v. FCC*, No. 90-1020 (D.C. Cir. Jan. 11, 1991). On December 16, 1991, the Formal Complaints and Investigations Branch sent an Amended Notice of Complaint to defendants that reactivated the case. *See* American Sharecom, Inc. v. Michigan Bell Telephone Co. and Wisconsin Bell Telephone Co., Inc., Amended Notice of Formal Complaint (December 16, 1991) and American Sharecom, Inc. v. Pacific Bell Telephone Co., Amended Notice of Formal Complaint (December 16, 1991).

discovery,[17] the parties to the various proceedings were required to submit initial briefs and reply briefs setting forth their respective claims and arguments.[18]

III. DISCUSSION

A. Liability For Damages

1. Contentions of the Parties

7. American Sharecom alleges that the rates it paid for certain of the defendants' interstate access services during the period from January 1, 1987 through December 31, 1988 were unjust and unreasonable and therefore in violation of Section 201(b) of the Act, 47 U.S.C. § 201(b). American Sharecom supports its allegations with evidence taken from reports filed with the Commission by the defendants for the 24-month period at issue that show that defendants achieved earnings in excess of the Commission's prescribed rate of return on one or more of the three interstate access categories established for the purpose of enforcing that rate of return prescription.[19]

8. American Sharecom requests that the Commission declare that the defendant LECs' charges for the period from January 1, 1987 through December 31, 1988 are in violation of the rate of return prescription and Section 201(b) of the Act, and to order the defendant LECs to pay damages to American Sharecom equal to the difference between the amount actually paid by American Sharecom for interstate access service during the period and the amount that American Sharecom would have paid if the defendants' charges earned no more than the maximum allowable rate of return, plus interest.

9. The defendants raise a number of issues that have been fully considered by the Commission in the *MCI Orders*. They will be briefly discussed below.

10. Defendants advance a variety of arguments to support their claim that American Sharecom has failed to state a cause of action under the Act. Primarily, the defendants argue that American Sharecom's claims are barred by *American Telephone and Telegraph v. FCC*.[20] These arguments take on several forms. Defendants contend that renaming a "refund" a "damage award" does not cure the inconsistencies the court found with respect to the automatic refund rule and in allowing the awarding of damages in the instant complaints.[21] Ameritech further argues that the Commission must consider underearnings in determining whether particular overearnings are in violation of the Act.[22] Finally, all three defendants contend that it is contrary to *AT&T v. FCC* to find a rate of return violation when overall earnings for interstate access service did not exceed 12.25 percent regardless of access category earnings in excess of 12.40 percent.[23]

11. Defendants also argue that the Commission is engaging in retroactive ratemaking should it order a carrier to make refunds solely because the carrier has exceeded the authorized rate of return.[24] Additionally, defendants argue that the Commission's action in CC Docket No. 84-800 did

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[17] *See* American Sharecom, Inc., v. Michigan Bell Telephone Company, *et al.*, 7 FCC Rcd 3967 (Com.Car.Bur.1992) (*Discovery Order*).

[18] Defendants filed their Answers on January 15, 1992. American Sharecom filed its Reply to Answer and Affirmative Defenses on January 29, 1992. American Sharecom filed its First Set of Interrogatories on July 6, 1992. Also on July 6, 1992, Ameritech filed Interrogatories, a Request for Production of Documents and a Motion to Serve Request for Production of Documents. On July 22, 1992, American Sharecom filed an Opposition to Motion to Serve Request For Production of Documents. On July 27, 1992, all defendants filed Answers to Interrogatories to American Sharecom. On July 29, 1992, American Sharecom filed its Response to Ameritech's First Set of Interrogatories. On August 3, 1992, American Sharecom filed an unopposed Motion to Accept Complainant's Late Filed Interrogatory Responses. Because American Sharecom's request is reasonable, we grant the motion and accept the late filed interrogatory responses. On August 14, 1992, Ameritech filed its brief (Ameritech Br.) and Pacific Bell filed its brief (Pacific Bell Br.). Also on August 14, 1992, American Sharecom filed its briefs (American Sharecom/Ameritech Br.; American Sharecom/Pacific Bell Br.). Finally, on August 26, 1992, defendants filed their Reply Briefs (Ameritech RBr., Pacific Bell RBr.) and American Sharecom filed its Reply Briefs (American Sharecom/Ameritech RBr.; American Sharecom/Pacific Bell RBr.).

[19] The interstate access service categories are special access, common line, and switched traffic sensitive. *See* 47 C.F.R. § 65.702(b). American Sharecom states that the monitoring reports recite that for the period January 1, 1987 through December 31, 1988, Michigan Bell earned a return of 15.09% in the switched traffic sensitive category; Wisconsin Bell earned 14.00% per annum for its interstate special access services; and Pacific Bell earned a return of 14.61% in the switched traffic sensitive category.

[20] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court invalidated the Commission's procedure to enforce its rate of return prescriptions through automatic refunds of carrier overearnings to customers. For a detailed discussion of *AT&T v. FCC*, *see MCI Liability Order*, 5 FCC Rcd at 221-223. The U.S. Court of Appeals for the Sixth Circuit, relying on *AT&T v. FCC*, vacated a Commission order dealing with refunds of earnings in excess of the authorized rate of return for the special access category over a period of years in the context of a strategic pricing investigation. *See Ohio Bell v. FCC*, 949 F.2d 864 (6th Cir. 1991) (*Ohio Bell*). The court primarily relied upon the statement from *AT&T v. FCC* that a rate of return prescription is both a minimum and a maximum prescription. *See AT&T v. FCC*, 836 F.2d at 1390. The Commission has clarified, however, that it does not view a rate of return prescription as both a maximum and a minimum and has stated that

> [o]ur accumulated experience with rate of return prescriptions, and our review of the cost of capital evidence in this proceeding, convince us that there is no such point. * * * We believe there is a substantial gap between an earnings level that is fully adequate to assure attraction of capital on favorable terms, and an earnings level which, if sustained over time, would be confiscatory.

Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, 5 FCC Rcd 7507, 7532 (1990), *appeal docketed sub nom. Illinois Bell Telephone Co., et al. v. FCC*, No. 90-1020 (D.C. Cir. Jan. 11, 1991).

[21] *See* Ameritech Br. at 3-5; Pacific Bell Br. at 4-7.

[22] *See, e.g.*, Ameritech Br. at 22-23.

[23] *See, e.g.*, Ameritech Br. at 11-12; Pacific Bell Br. at 7-11.

[24] *See, e.g.*, Ameritech Br. at 22; Pacific Bell Br. at 14. Defendants argue specifically that under *Illinois Bell v. FCC*, 966 F.2d 1478 (D.C. Cir. 1992) (*Illinois Bell*), the Commission may only engage in prospective ratemaking when the investigative and accounting requirements of §204(a) have not been met.

not create a private cause of action that would permit an individual remedy.[25] Ameritech also argues that rates charged in conformity with a lawfully filed tariff cannot then be found to be unjust and unreasonable merely because they later proved to be too profitable.[26]

12. Each of the defendants argues that all of American Sharecom's claims are barred by Section 415 of the Act, which establishes a two-year statute of limitations on the filing of complaints.[27] According to the defendants, Section 415 bars the recovery of any damages if sought more than two years after the occurrence of any overearnings, in this case barring American Sharecom's claims for services delivered prior to September 27, 1989 (two years prior to the filing of the complaint).[28]

13. Defendants also argue that the decision in *Ohio Bell*, issued after the release of the *MCI Liability Order*, requires dismissal of American Sharecom's complaints.[29] According to the defendants, *Ohio Bell* reaffirms the proposition established in *AT&T v. FCC* that the Commission cannot award damages for carrier overearnings without allowing the carrier to re-coup or offset underearnings.[30] Defendants contend that these propositions are not confined to the Commission's ratemaking activities under Sections 204-205 of the Act[31] but are equally applicable when the Commission decides private complaints for damages under Section 208 of the Act.

14. Finally, Ameritech argues that the rates charged were not carrier-initiated, and that therefore, there has been no violation of the Act or the rules.[32]

2. Discussion

15. We have carefully examined the record before us and conclude that the defendants, all of whom were defendants in the MCI complaint proceedings, have cited no facts and have made no arguments here that would warrant a ruling contrary to the *MCI Orders*.

16. *Failure to State a Cause of Action:* In the *MCI Liability Order*, we rejected identical claims made by the same defendants and held that *AT&T v. FCC* establishes no precedent that bars an individual complainant from seeking a remedy under Section 208 of the Act for damages based on a carrier's reported overearnings.[33] We stated that

> we are not persuaded by defendants' claims that earning in excess of a prescribed rate of return does not violate that Act or, if it does, that the Commission *is required* to take a carrier's underearnings as well as its overearnings into account in determining whether a violation has occurred.
>
> * * * * * * *
>
> We find that a valid prescription bound the defendants to a maximum earnings limitation, and the defendants admit that they earned in excess of the amount during the period in question.[34]

We found further that *AT&T v. FCC* did not govern Section 208 complaint proceedings. The Commission has the authority to order a carrier to pay damages if a complainant meets the burden of establishing both a violation of the Act and the actual injury.[35]

17. In addition, we have previously held that enforcement of a rate of return prescription is not retroactive ratemaking because the obligation being enforced was set prospectively when the prescription was adopted.[36] Defendants have not persuaded us to alter our decision. We have also rejected the contention that rates charged in conformity with a lawfully filed tariff cannot be unjust and unreasonable.[37] We point out that the issue is not the lawfulness of high profits in the abstract, but the lawfulness of profits in excess of a prescription. Accordingly we hold that, taking into account the buffer, profits in excess of a prescription are unjust and unreasonable.

18. *Statute of Limitations:* American Sharecom is correct in its assertion that it had until September 30, 1991 to file its complaints based on monitoring reports filed by defendants with the Commission on November 6, 1989.[38] We have previously held that the date of the filing of the final monitoring report is dispositive with regard to the date a complainant discovers the right or wrong or the facts on which such knowledge is chargeable as a matter of law.[39] Defendants have made no argument that persuades us to alter this holding. Section 415 does not bar American Sharecom's complaints.

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[25] Ameritech Br. at 6-7; Pacific Bell Br. at 12.

[26] Ameritech Br. at 13-14.

[27] Section 415 provides, in pertinent part, that "[a]ll complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after...." 47 U.S.C. § 415(b) (1982). The term "overcharges" is defined in Section 415 "to mean charges for services in excess of those applicable thereto under the schedules of charges lawfully on file with the Commission." 47 U.S.C. § 415(g) (1982).

[28] *See* Ameritech Answer at para. 13; Pacific Bell Answer at para. 19.

[29] Ameritech Br. at 7-12; Pacific Bell Br. at 6-9.

[30] Ameritech Br. at 6-9; Pacific Bell Br. at 11-12.

[31] 47 U.S.C. §§ 204-205.

[32] Ameritech Br. at 13-14. Ameritech contends that because its rates were computed pursuant to the Commission's formulas, and further, because the rates were subject to Commission review, its rates were effectively prescribed by the Commission. Ameritech Br. at 7-9; Pacific Bell Br. at 11-12.

[33] *MCI Liability Order*, 5 FCC Rcd at 222-3.

[34] *MCI Liability Order*, 5 FCC Rcd at 223 [emphasis in the original].

[35] *Id.*

[36] *Id.* at 222.

[37] *Id.*

[38] American Sharecom cites to the Bureau's Show Cause Orders in both the AT&T and MCI proceedings to support its argument. *See, e.g.*, MCI Telecommunications Corp. v. Michigan Bell, *Order to Show Cause*, 4 FCC Rcd 6099, 6101, n.8. This holding was subsequently adopted by the Commission. *See MCI Liability Order*, 5 FCC Rcd at 224-25.

[39] In the *MCI Liability Order* we stated:

> the defendants filed the rate of return monitoring reports which...were developed by the Commission for several purposes, including making information about carrier earnings public[ly] available. Moreover, the monitoring reports relied on by MCI in its complaints were specifically designated by the Commission as a "final" and conclusively binding determination of a carrier's earnings.

19. *Ohio Bell:* We disagree with the defendants' claim that *Ohio Bell* and *AT&T v. FCC* compel us to dismiss American Sharecom's complaints. As we emphasized in the *MCI Liability Order* and reaffirmed in the *MCI Damages Order,* automatic refunds and refunds ordered under Section 204 of the Act are different from individual actions for damages under Section 208. Unlike the automatic refund mechanism in *AT&T v. FCC* or the refund procedure in *Ohio Bell,* both of which resulted from rulemaking proceedings initiated at the Commission's discretion, individual actions for damages under Section 208 are initiated by private parties seeking damages for injuries to themselves; those private parties have the burden of establishing both a violation of the Act and actual injury.[40] The courts in *AT&T v. FCC* and *Ohio Bell* did not discuss private complaints for damages; they did not invalidate private actions for damages; and their holdings are not applicable to the different separately authorized complaint procedure set forth in Sections 206-209. Accordingly, those decisions do not require us to depart from our holding in the *MCI Liability Order* that defendants have violated the Communications Act by earning in excess of a valid rate of return prescription, thereby making their rates unjust and unreasonable under Section 201 of the Communications Act and themselves liable for damages to the extent a complainant/customer can establish that it was damaged as a result of the violation.[41]

20. Finally, we reject Pacific Bell's claim that access rates were not carrier-initiated. We rejected an identical argument in the *MCI Liability Order*[42] and have not been persuaded to alter that decision.

B. Damages and Interest Claims

21. American Sharecom's damages claims rest primarily on the contention that the proper measure of damages it incurred as a result of the defendants' rate of return prescription violations is the difference between the amounts it actually paid the defendants for interstate access services during the January 1, 1987 through December 31, 1988 monitoring period and the amount it would have paid if the defendants' rates produced earnings that did not exceed the Commission's prescription. Quoting *New England Telephone v. FCC,*[43] American Sharecom argues that it is reasonable for carriers "to pay full interest for earnings they had no right to retain in the first place."[44] The defendants, however, have raised a number of challenges to American Sharecom's damages claims, including a number of arguments that were previously considered and rejected by the Commission in the *MCI Liability Order* and the *MCI Damages Order.*[45] We address the parties' contentions below.

1. Damages

a. Contentions of the Parties

22. As referenced above, American Sharecom's damages claims rest primarily on the contention that the proper measure of the damages it incurred as a result of defendants' violations is the difference between the amount it actually paid defendants for interstate access services during the January 1, 1987 through December 31, 1988 period and the amount it would have paid if the defendants' rates had produced earnings that did not exceed the Commission's prescribed rate of return. In the *Discovery Order,* the Bureau stated that it tended to agree, in principle, that a possible measure of the damages stemming from defendants' rate of return violations could be that difference.[46] The Bureau was not persuaded on the record before it, however, that a damages determination based solely on such a measure necessarily reflected actual damages incurred by American Sharecom.[47] The defendants were invited to submit evidence that could serve to mitigate or otherwise reduce American Sharecom's damages claims. Specifically, the Bureau stated that evidence demonstrating that American Sharecom's share of excessive earnings realized in a particular access category by a defendant could be offset or otherwise reduced due to facts and circumstances surrounding American Sharecom's purchase of other interstate access services from such defendant for the relevant monitoring period might be relevant.[48]

23. American Sharecom contends that it should be awarded damages of $5,296 from Michigan Bell, $8,609 from Wisconsin Bell, and $5,651 from Pacific Bell, all exclusive of interest. American Sharecom states that the data underlying these calculations were taken from defendants' Forms 492, defendants' responses to discovery, and from American Sharecom's own records.[49] While American Sharecom used the correct rate of return in calculating its damages resulting from Wisconsin Bell's overearnings, it failed to incorporate the appropriate rate of return in its calculations of Michigan Bell's and Pacific Bell's overearnings. In Attachment 2 of American Sharecom's Ameritech brief, American Sharecom used 12.25% as the maximum allowable rate of return in calculating Michigan Bell's overearnings in the switched traffic sensitive category. It again applied 12.25% as the maximum allowable rate of return in calculating Pacific Bell's overearnings in the same category.[50] American Sharecom should have utilized

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5 FCC Rcd at 225. We note further that, we have held that Section 415(e) is inapplicable to the type of complaints we deal with here. Section 415(e) concerns a carrier's liability to its customers for failure to transmit a message in accordance with its common carrier obligations. The instant complaints deal with the lawfulness of defendants' rates, not defendants' transmissions or obligations to transmit messages properly. *See MCI Reconsideration Order,* 5 FCC Rcd at 3464.

[40] *See MCI Liability Order,* 5 FCC Rcd at 222-23, para. 55.

[41] *Id.* at 226, para. 86.

[42] *Id.* at 223-24.

[43] 826 F.2d 1101 (D.C. Cir. 1987) *cert. denied,* 109 S.Ct. 1942 (1989).

[44] 826 F.2d at 1113.

[45] The issues and arguments raised by Ameritech and Pacific Bell in response to American Sharecom's claims are essentially identical. For the sake of convenience and clarity, we will refer to defendants' arguments as if they are part of the same pleading. To the extent that individual defendants raise separate or unique arguments, we will address them separately.

[46] *Discovery Order,* 7 FCC Rcd at 3967, para. 6.

[47] *Id.*

[48] *Id.*

[49] *See* American Sharecom/Ameritech Br. at 29-33, American Sharecom/Pacific Bell Br. at 29-31. According to American Sharecom, all of the data are included in the record of these proceedings.

[50] American Sharecom/Pacific Bell Br. at Attachment 2.

the category rate of return of 12.40% and not the aggregate rate of 12.25% in determining its claims against defendants' category overearnings. As delineated in the Commission's rate of return prescription,[51] the maximum allowable rate of return for interstate access services for the 1987-88 monitoring period is 12.25% in the aggregate and 12.40% (12.00% plus .40% buffer) for any service categories set forth in 47 C.F.R. § 65.702(b). Because American Sharecom's complaints seek damages against category-based overearnings, it should have applied, as we will apply here, the 12.40% maximum allowable rate of return for category-level overearnings.

24. American Sharecom provided its calculations in Attachments 1 and 2 of its brief, where it first determined, for each study area and access service category in which a defendant's earnings exceeded the rate of return prescription, the maximum allowable category earnings by multiplying the rate base by the maximum allowable category rate of return over the period reflected in the Monitoring Report. American Sharecom then subtracted this amount from the category operating income shown on the Monitoring Report to determine the after-tax overearnings. To determine the pre-tax overearnings, American Sharecom divided the after-tax overearnings by 1 minus the defendants' effective tax rate. American Sharecom then calculated its base damage award by multiplying defendants' pre-tax overearnings by American Sharecom's percentage of overcharges, determined by dividing complainant's access category purchases by the total access category revenues.

25. American Sharecom also claims interest calculated at the maximum allowable rate of return for the monitoring period compounded daily.[52] It contends that it is entitled to interest on the damage amounts which, through July 31, 1992, total $10,228 for both Michigan Bell and Wisconsin Bell; and $4,157 in the case of Pacific Bell. We note that in its interest calculations, American Sharecom again used the wrong maximum rate of return (12.25% instead of 12.40%) and hence arrived at inaccurate final figures.

26. The defendants challenge American Sharecom's damages claims on a number of grounds, raising several arguments that were previously considered and rejected by the Commission in the *MCI Liability Order* and the *MCI Damages Order*. Defendants contend that by simply basing its damages claims on a calculation of American Sharecom's prorated share of category-level overearnings, American Sharecom asks the Commission to award it damages in the same amounts it would have received under the automatic refund rule invalidated by the court in *AT&T v. FCC*.[53] The defendants maintain that such a result is expressly precluded by *AT&T v. FCC*. The defendants add that the decisions in *Ohio Bell* and *New England Telephone v. FCC* preclude an award of damages based solely on category level overearnings.

27. Defendants also argue[54] that American Sharecom's reliance on *New England Telephone* in support of its claim that the Commission has the authority to award damages for category overearnings is misplaced in light of *Illinois Bell*. According to Pacific Bell, the *Illinois Bell* decision requires the Commission to first suspend rates under Section 204 before ordering a "refund" of overearnings.[55] Moreover, defendants contend that *New England Telephone's* validity is further weakened by the Sixth Circuit's *Ohio Bell* opinion, which invalidated a Commission order requiring category-level refunds.[56]

28. Defendants next contend that, even if *AT&T v. FCC* and *Ohio Bell* do not preclude American Sharecom's damages claims, the claims still fail because American Sharecom's complaints do not establish a valid cause of action. According to defendants, to pursue a damages claim, American Sharecom must first show that the defendants charged unjust and unreasonable rates for interstate access services during the period in question, not that defendants' rates produced excessive returns in individual service categories.[57] Moreover, defendants argue that Section 206 of the Act[58] requires American Sharecom to prove injury, causation, and the amount of damages in addition to establishing a violation of the Act.[59] Defendants rely on the opinions in *Southern Railway Co. v. Seaboard Allied Milling Co.*[60] (*Seaboard*) and *Aeronautical Radio, Inc. v. FCC* (*ARINC*)[61] to buttress their proposition that where a complaint procedure is available to customers who believe that a tariff rate is unreasonably high, the measure of damages is not the full overcharge but the complainant's actual damages.[62] Arguing that the difference in rates and resultant earnings is not the measure of damages in a complaint case,[63] defendants maintain that by simply referencing defendants' earned rates of return for individual access service categories, American Sharecom has not only failed to allege any facts that would establish

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[51] Authorized Rate of Return for the Interstate Access Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, *see* note 7, *supra*.

[52] American Sharecom/Ameritech Br. at 31-33; American Sharecom/Pacific Bell Br. at 32-33.

[53] *See, e.g.*, Ameritech Br. at 21-22; Pacific Bell Br. at 4-7. In addition, defendants contend that *Ohio Bell* makes clear that it was the end result of the automatic refund mechanism, not the mechanism itself, that was unlawful. *See, e.g.*, Pacific Bell Br. at 5-7.

[54] Ameritech Br. at 11-12; Pacific Bell Br. at 8-11.

[55] Pacific Bell Br. at 10.

[56] Ameritech Br. at 10; Pacific Bell Br. at 10.

[57] *See, e.g.*, Pacific Bell Br. at 15. Pacific Bell argues that American Sharecom must specify an identifiable rate that American Sharecom paid that was too high or too low. It cites to a 1970 circuit court decision to support its claim that where retroactive relief is ordered for rates paid pursuant to a tariff that is subsequently found unjust and unreasonable, the Commission must determine what a just and reasonable rate is. *Id.*, citing to *Middlewest Motor Freight Bureau v. United States*, 433 F.2d 212, 232 (8th Cir. 1970) (*Middlewest*), *cert. denied*, 402 U.S. 999 (1971). As we determined in the *MCI Damages Order*, Pacific Bell's reliance on *Middlewest* is misplaced. *MCI Damages Order* at n.56.

[58] *See* 47 U.S.C. § 206.

[59] *See* Ameritech Br. at 19-20; Pacific Bell Br. at 17-18.

[60] 442 U.S. 444, 455 (1979).

[61] 642 F.2d 1221 (D.C. Cir. 1980).

[62] Ameritech Br. at 19-20; Pacific Bell Br. at 17.

[63] *See, e.g.*, Pacific Bell Br. at 16-17. Pacific Bell argues that:

> Injury or damages are not shown by demonstrating that there is a difference between the amount actually paid by American Sharecom and the amount American Sharecom would have paid if Pacific's access services had earned within the zone of reasonableness established by the Commission.

that defendants' rates were unjust and unreasonable during the period in question but has also failed to show that it sustained actual damages as a result of those rates.[64]

29. The defendants each raise distinct arguments to support their claims that an award of damages to American Sharecom based on carrier overearnings is inappropriate for equitable and policy reasons. Defendants vigorously argue that American Sharecom is actually seeking restitution or a refund of tariffed charges, not damages. Ameritech further contends that the monitoring reports, upon which American Sharecom based its complaint, do not accurately represent defendants' actual return on investment for the monitoring period because the Commission's rate base formula is inconsistent with the Commission's rate of return formula.[65] Ameritech also argues that an award of damages would be inequitable because American Sharecom would receive a windfall that would be inconsistent with sound equitable principles.[66]

30. For its part, Pacific Bell argues that American Sharecom's claim for damages is flawed because American Sharecom simply assumes that lower rates would have produced lower earnings and offers no probative evidence to show what a reasonable rate would have been or to otherwise support its damages claims.[67] Pacific Bell argues, as does Ameritech, that American Sharecom would receive a windfall if it has passed the "overcharges" on to its customers and is now awarded damages.[68] Pacific Bell argues that had its access charges to American Sharecom been lower in 1987-1988, it is almost certain that American Sharecom's rates to its customers would have been lower.[69] Pacific Bell cautions the Commission to look at the "backdrop of the practical consequences" and ensure that any decision granting American Sharecom "refunds" is equitable under the circumstances.[70] Pacific Bell further argues that, should the Commission award damages to American Sharecom, the Commission should order American Sharecom to pass the damages through to its end users in the form of a rate reduction.[71]

31. Finally, Pacific Bell argues that American Sharecom should not be awarded damages because of Pacific Bell's overearnings in the special access service category during the 1987-1988 period. It claims that (i) American Sharecom purchased no special access services and therefore could not have been injured by unjust or unreasonable special access rates, and that (ii) the *Ohio Bell* decision precludes the Commission from finding Pacific Bell's 1987-88 special access rates were unjust or unreasonable due to category overearnings.[72]

32. American Sharecom counters that defendants' threshold arguments regarding the effect of the court's ruling in *AT&T v. FCC* have largely been rejected or precluded by the *MCI Liability Order*.[73] American Sharecom states that defendants' arguments that it has failed to allege and prove violations of the Act and actual damage are unfounded because it has made a sufficient showing of each under traditional principles governing its statutory right to such relief. According to American Sharecom, the only injury and causation it need show are the injury and causation arising from its payment of excessive rates for services it purchased from defendants during the relevant period. American Sharecom maintains that it has shown that defendants charged it rates that produced earnings in excess of the Commission's prescribed rate of return and argues that its damages are the excessive charges that American Sharecom paid.[74]

33. American Sharecom also contends that the so-called similarities between its damages requests and the automatic refund do not transform the private complaint remedy into a public enforcement refund remedy as alleged by the

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[64] *See, e.g.*, Ameritech Br. at 19-20; Pacific Bell Br. at 17-18. Ameritech contends that the principle that American Sharecom must still prove it was damaged and in what amount was established by the Supreme Court in *Seaboard* in construing relevant sections of the Interstate Commerce Act. The Court stated:

> [O]ur sole concern is the Commission's decision not to investigate under § 15(8)(a) [204], a decision that has only two final consequences. First, the burden of proof with regard to *reasonableness* is placed on the shipper under § 13(1) [208] rather than on the carrier, who would have borne it in a § 15(8)(a) [204] proceeding. (With respect to all other aspects of lawfulness, however, the burden is borne by the shipper in both proceedings.) Second, the shipper's relief, if unlawfulness is proved, is limited under § 13(1) [208] to actual damages rather than the full refund of overcharges available under § 15(8)(a) [204].

442 U.S. at 454-55. Ameritech states that this ruling has been found applicable to proceedings under the Communications Act. *See ARINC*, 642 F.2d at 1235 n.35. As we determined in the *MCI Damages Order*, Ameritech's reliance on case precedent is misplaced. *MCI Damages Order* at n.59.

[65] Ameritech Br. at 17. Ameritech argues that the rate base formula disallows significant amounts of prudently invested capital with the end result of preventing investors from "recover[ing] their full cost of capital."

[66] *Id.* at 22-24.

[67] Pacific Bell Br. at 18-19.

[68] *See, e.g., id.* at 19.

[69] Pacific Bell Br. at 18. Pacific Bell cites to numerous newspaper and magazine articles to support this contention.

[70] *Id.* at 16 citing to *Las Cruces TV Cable v. FCC*, 645 F.2d 1041 (D.C. Cir. 1981) (*Las Cruces*). In *Las Cruces*, the court upheld, in part, and remanded, in part, a Commission decision requiring refunds under Section 204 of the Act. The court noted that *Las Cruces*

> is the first time that the Federal Communications Commission has attempted to articulate standards governing its award of refunds to customers of a communications common carrier under Section 204 of the Act.

645 F.2d at 1046. Pacific Bell's reliance on *Las Cruces* is unavailing, however, because equitable considerations that may impact a Section 204 investigation are not applicable in individual Section 208 complaint proceedings.

[71] Pacific Bell Br. at 19.

[72] *Id.* at 20.

[73] American Sharecom/Ameritech RBr. at 6-8.

[74] American Sharecom/Pacific Bell RBr. at 6-7.

defendants. American Sharecom argues that the statutory complaint remedy preceded the automatic refund rule and thus survives the invalidation of that rule.[75]

34. American Sharecom next argues that defendants' offset arguments should be rejected because the Commission cannot retroactively repeal the category rate of return prescription. Such a repeal would, according to American Sharecom, defeat the key purpose of the rate of return prescription: protecting ratepayers from discriminatory and anticompetitive LEC conduct.

35. Finally, American Sharecom argues that unlike Section 204 of the Act[76] which grants the Commission discretionary authority to weigh equitable considerations, Section 206 of the Act[77] imposes upon the Commission an absolute duty to award full damages and to therefore reject defendants' offsets arguments. American Sharecom contends that, even if taken into account, any equitable considerations weigh in its favor rather than in the favor of the defendants.[78] According to American Sharecom, by establishing a rate of return prescription that balanced shareholder and ratepayer interests, the Commission did all that was necessary in "balancing the equities."[79]

Discussion

36. *AT&T v. FCC and Ohio Bell:* The defendants' claims that the holdings in *AT&T v. FCC* and *Ohio Bell* control these proceedings and bar an award of damages to American Sharecom are without merit for the reasons stated in both the *MCI Liability Order* and the *MCI Damages Order*. In the liability section above, we again emphasized that the court in *AT&T v. FCC* explicitly acknowledged the Commission's authority to order a carrier to disgorge earnings in excess of a rate of return prescription,[80] finding only the remedy component of the Commission's rate of return prescription (the automatic refund mechanism) to be unlawful.[81] More to the point, we emphasized that "the [*AT&T v. FCC*] opinion does not address Section 208 complaint proceedings nor purport to alter the statutory scheme of the Act or the remedies Congress established therein.[82] Similarly, as we stated in the *MCI Damages Order*, the *Ohio Bell* decision does not expand upon *AT&T v. FCC* and does not address the Commission's authority to award damages in private complaint actions under Section 208 of the Act.[83]

37. *Section 201(b) of the Act:* We turn now to the defendants' contention that American Sharecom's damages claims must be dismissed because American Sharecom has failed to prove defendants' rates were unjust and unreasonable within the meaning of Section 201(b) of the Act. In the liability section above, we held that the complainant met its burden of proof by establishing that the defendants violated our rate of return prescription.[84] Accordingly, the question before us now is not whether defendants' rates were unjust and unreasonable; rather the questions now are whether the complainant suffered any measurable damage as a consequence of paying rates previously determined by the Commission to be unlawful under Section 201(b).

38. We reject defendants' argument that *Illinois Bell* requires the Commission to first resort to a Section 204(b) investigation to determine if a refund of overearnings is appropriate. As the Commission explained in the *MCI Damages Order, Illinois Bell* addresses the Commission's authority under Section 204, not Section 208.[85] Hence, because this is a Section 208 complaint case, and not a Section 204 refund case, defendants' contention that *Illinois Bell* deprives the Commission of the authority to award damages for violation of a valid rate of return prescription has no merit.

39. The defendants' next claim, that even if American Sharecom has sustained its burden and shown that defendants' rates were unjust and unreasonable, its damages claims must still fail because judicial precedent compels American Sharecom to establish what a just and reasonable rate would have been as a prerequisite to pursuing damages claims based on unreasonable rates, has previously been discussed and rejected by the Commission. In the *MCI Damages Order* we reemphasized[86] the Commission's authority to prescribe and enforce carriers' rates of return, pointed out that the issue in these proceedings is not whether individual rates are unlawful, but whether cumulative rates that produced earnings over and above a prescribed rate of return are unjust and unreasonable, and agreed with the Bureau's determination in the *Discovery Order* that a proper starting point for assessing damages based on violations of a rate of return prescription is to look at the difference between the amount complainant paid for defendants' interstate access services and the amount it would have paid if defendants had charged rates that produced returns within the Commission's prescribed levels.[87] We said, "[i]t is appropriate and consistent with the Commission's rate of return regulatory scheme to inquire as to earnings in excess of prescribed levels for purposes of assessing damages claims."[88] American Sharecom has shown that it purchased services from defendants at rates

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[75] *Id.* at 8-11. In addition, American Sharecom points out the damages to which it is entitled under Section 208 are compensation for actual loss as opposed to a share of a carrier's "restitution" of its unjust enrichment which would have been the case under the automatic refund rule. American Sharecom also contends that it would have been eligible for its share of the carrier's restitution under the automatic refund rule even if it were not a customer of the carrier during the monitoring period when rates were excessive. *Id.* at 10-12.

[76] 47 U.S.C. §204(a)(1).

[77] 47 U.S.C. §206.

[78] *See* American Sharecom/Pacific Bell RBr. at 14-15.

[79] *Id.* at 16.

[80] *AT&T v. FCC*, 836 F.2d at 1392 ("Thus, as we previously have concluded, the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate of return prescription").

[81] Indeed, the court in *Ohio Bell* recognized the continuing efficacy of our rate of return framework. *See* 949 F.2d at 868.

[82] *MCI Liability Order*, 5 FCC Rcd at 223, para. 56.

[83] *MCI Damages Order* at para. 26.

[84] In the *MCI Liability Order*, we held that the complainant therein could prove that defendants' rates were unjust and unreasonable by proving that the defendants violated our rate of return prescription. *See MCI Liability Order*, 5 FCC Rcd at 226.

[85] *MCI Damages Order* at para. 27.

[86] For a full discussion of the Commission's authority to prescribe and enforce carriers' rates of return, *see MCI Liability Order*, 5 FCC Rcd 222-223.

[87] *MCI Damages Order* at para. 29.

[88] *Id.*

that produced earnings over and above the defendants' prescribed levels. We previously determined in the *MCI Liability Order* that a violation of such a prescription constitutes a violation of the Act for which damages may lie.

40. *Damages and Offsets:* The defendants' arguments are devoted primarily to attempting to persuade the Commission that American Sharecom's damages claims are really claims for restitution or refunds governed by equitable or public policy considerations. These considerations, according to defendants, militate against any award of damages to American Sharecom based on excessive earnings. The defendants argue, in effect, that the damages American Sharecom seeks are equivalent to refunds that would have been required under the refund mechanism invalidated by the court in *AT&T v. FCC*. We do not agree. We are concerned here with determining whether a particular customer, which has availed itself of a statutory complaint remedy under Title II of the Act, has sustained any measurable damage that can be traced to defendants' violations of the Act. Although a damages award under Section 208 of the Act might well be equal or substantially similar to a refund ordered under Section 204 of the Act,[89] this does not transform a private complaint action into a public enforcement proceeding subject to broad public interest considerations.

41. As in the *MCI Damages Order*, we find defendants' arguments with respect to "passing-on" equally unavailing. In rejecting this same argument, we said, "[w]hether [complainant] passed on the overcharges or absorbed them does not alter the fact that the defendants overcharged [complainant] in violation of a binding rate of return prescription and must answer for such violations."[90] The issue is not what American Sharecom has done in response to paying excessive rates, but whether American Sharecom has been damaged as a result of these excessive rates.[91]

42. Nor can we accept the defendants' related claim that we should require American Sharecom to flow through any damages it may receive to its end user customers. Sections 206-209 of the Act give private parties the right to file complaints challenging the acts or omissions of carriers and to recover monetary damages resulting from such acts or omissions. Complainants, however, are charged, as American Sharecom is in the instant case, with the burden of establishing violations of the Act or Commission rule or order and the amount or extent of damage suffered as a consequence of such violations. Accepting defendants' flow through argument would, in effect, transform American Sharecom's complaints into class action suits on behalf of its customers, a result neither expressly contemplated by nor consistent with the private remedy created under Sections 206-209 of the Act.

43. In addition, we reject American Sharecom's claim that the allowance of offsets would somehow repeal our rate of return prescription on a category basis and be contrary to issues of equity. The issue of damages to a particular complainant is separate and apart from the validity and effect of our rate of return prescription. The determination we make here is the extent to which complainant suffered damage on account of defendants' violations of the rate of return prescription. The question of offsets is relevant to that determination and no other.

44. Ameritech requested that the Commission reduce any damage award with offsets[92] and provided, as Attachments 1 and 2 to their brief, a chart listing what they describe as undercharges and overcharges to American Sharecom based on earned rates of return of 12.59% (common line), 15.09% (traffic sensitive) and 6.03% (special access) for Michigan Bell, and 12.11% (common line), 11.59% (traffic sensitive) and 14.00% (special access) for Wisconsin Bell during the relevant monitoring period. Pacific Bell makes no claim for an offset and instead argues that the Commission should not award damages to American Sharecom because complainant purchased no special access services from the defendant.[93] Because American Sharecom seeks damages for Pacific Bell's overearnings in the switched traffic sensitive category,[94] and not in the special access category, Pacific Bell's argument is moot.

45. We have carefully reviewed the arguments and evidence presented by the parties and believe that some offset to the claimed damages amounts is appropriate. In the *MCI Liability Order*, we specifically rejected claims by the defendants that the Commission is required to take a carrier's interstate access underearnings as well as overearnings into account in determining whether a violation of the Act has occurred because this would be at odds with established case law.[95] However, we stated in the *MCI Damages Order* that it is appropriate to consider defendants' underearnings in assessing complainant's damage or injury resulting from defendant's overearnings in a particular monitoring period[96] and rejected the complainant's contention that this approach results in unlawful cross-subsidization.[97] The parties have made no argument which persuades us to alter our holdings.

46. Based upon our decision regarding the computation of damages here, we award damages to American Sharecom from Michigan Bell in the amount of $4,324.[98] In reaching this amount, we have adjusted American Sharecom's

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[89] *See Seaboard*, 442 U.S. 444, 455, n.8:

> If a shipper proves a rate is unreasonable and that he was damaged in the full amount he was overcharged, the outcome of a § 13(1) [§ 208] proceeding will be no different than that of a § 15(8)(a) [§ 204] proceeding in which the carrier fails to establish the reasonableness of the rate.

[90] *MCI Damages Order* at para. 31.

[91] While defendants have asserted that lower charges to complainant would have resulted in lower charges to complainant's customers, they have provided no persuasive evidence in support of this contention. Pacific Bell, for example, relies solely on press clippings that purportedly show that American Sharecom's rates to its customers would have been affected by changes in defendants' rates. Pacific Bell Br. at 18-19. These clippings do not, however, establish, as a matter of law, that complainant, in fact, passed on defendants' overcharges to its customers.

[92] Ameritech Br. at 22-23 and RBr. at 8.

[93] Pacific Bell Br. at 20.

[94] American Sharecom/Pacific Bell RBr. at 2; *see also* American Sharecom/Pacific Bell Br. at Attachment 2.

[95] *MCI Liability Order*, 5 FCC Rcd at 223, paras. 59-60, citing *Nader v. FCC*, 520 F.2d 182, 201 (D.C. Cir. 1975). *See also AT&T v. FCC*.

[96] *MCI Damages Order* at para. 38.

[97] *Id.* at para. 39.

[98] This amount is calculated as follows:

calculation of Michigan Bell's overearnings using a rate of return of 12.40% rather than the 12.25% American Sharecom utilized as the category earnings rate base. Implementing the correct rate of return, we compute Michigan Bell's overearnings as $4,341 in the traffic sensitive category. We then reviewed Attachment 2 to Ameritech's brief[99] which sets forth calculations of American Sharecom's share of overearnings and underearnings at three rate of return levels. Based upon our review of the calculations provided by Michigan Bell at a 12.00% rate of return, Michigan Bell has shown that it is entitled to offset its overearnings in the traffic sensitive category with American Sharecom's share of underearnings in the special access category by the amount of $17.

47. We award damages to American Sharecom from Wisconsin Bell in the amount of $8,609. In reaching this amount, we have calculated Wisconsin Bell's overearnings as $8,609 for the special access category. Wisconsin Bell has not shown that it is entitled to an offset.

48. We award damages to American Sharecom from Pacific Bell in the amount of $5,292. In reaching this amount, we have adjusted American Sharecom's calculation of Michigan Bell's overearnings utilizing a rate of return of 12.40% rather than the 12.25% for the category earnings rate base. Using the correct rate of return, we compute Pacific Bell's overearnings as $5,292 in the traffic sensitive category. Pacific Bell has not shown that it is entitled to an offset.

2. Interest on Damages Awards

a. Contentions of the Parties

49. Defendants' final claim is that American Sharecom is not entitled to prejudgment interest should the Commission award damages to American Sharecom. Pacific Bell grounds its claim, *inter alia*, on its contention that the amount of damages has been sharply disputed in these proceedings.[100] Pacific Bell claims that interest would penalize it even though it has not been accused of deliberate wrongdoing, and that interest is not necessary to make American Sharecom whole. Ameritech simply contends that while the Commission may award interest under Section 204 of the Act, there is no provision for the award of interest under Section 206 of the Act. Because we cannot lawfully grant American Sharecom a refund, Ameritech argues, we may not award interest.[101]

50. American Sharecom disputes defendants' claims that it is not entitled to prejudgment interest in connection with any ultimate damages award. American Sharecom contends that an award of prejudgment interest is appropriate in the instant cases because defendants could ascertain with sufficient certainty the amount of American Sharecom's damages. American Sharecom also argues that an award of interest is required to effectuate the purposes of the Commission's complaint remedy.[102] American Sharecom contends it is entitled to interest at the maximum allowable rate 2 of return from January 1, 1988 through July 31, 1992.

b. Discussion

51. Defendants' claim that the Commission lacks the requisite authority to award interest in a Section 208 common carrier complaint proceeding has no merit. Although an award of interest does not fall squarely within the ambit of Section 208 of the Communications Act, our authority under Sections 4(i) and other sections of the Act to award interest in a common carrier complaint case is well established.[103] In deciding whether to award interest in a particular common carrier complaint case we are generally guided by federal court practice, where the award of prejudgment interest "... is a matter left to the sound discretion of the trial court."[104] The award of interest in a common carrier complaint case is thus guided by considerations of fairness. Applying this standard, we are persuaded that an award of interest is appropriate in these cases. American Sharecom was effectively deprived of the use of the excessive amounts it paid defendants as a result of defendants' unlawful rates while defendants, on the other hand, enjoyed the beneficial use for a substantial period of time of funds to which American Sharecom rightfully has a claim. We are persuaded that interest is required not only to effect a full and fair remedy for American Sharecom, which paid rates higher than it would have paid had defendants earned within the prescribed level, but also to avoid any unjust enrichment of defendants stemming from their charging rates that we have determined to be unjust and unreasonable under Section 201(b) of the Act.[105] We conclude that interest should be computed at the IRS rate for tax refunds.[106] In

$ 4341 (overcharges - switched traffic sensitive category)

\- 17 (undercharges - special access category)

$ 4324 Damages

[99] Attachments 2 and 3 of Ameritech's Opening Brief contain a summary and compilation of Ameritech's overearnings and underearnings by rate element multiplied by American Sharecom's market share to arrive at the dollar amount by which American Sharecom overpaid or underpaid for element specific access services. Because Ameritech utilized the wrong rate of return (12.40%) in its formulas used for determining overearnings, we have determined Ameritech's underearnings by revising its calculations to reflect the correct rate of return (12.00% as the base rate without the .40% buffer).

[100] *See, e.g.*, Pacific Bell Opening Br. at 22.

[101] Ameritech Br. at 24-25.

[102] *See* American Sharecom/Pacific Bell Opening Br. at 27-28.

[103] *See* MCI Telecommunications Corporation v. American Telephone and Telegraph Company, *et al.*, 94 FCC 2d 332, 343-46 (1983).

[104] *United States v. California Board of Equalization*, 650 F.2d 1127, 1132 (9th Cir. 1981), *aff'd*, 456 U.S. 901 (1982), *reh'g denied*, 456 U.S. 985 (1982).

[105] *See New England Telephone and Telegraph Co. v. FCC*, 826 F.2d 1101, 1113 (D.C. Cir. 1987), *cert. denied*, 109 S. Ct. 1942 (1989) (carriers may reasonably be required "to pay full interest for earnings they had no right to retain in the first place.").

[106] We believe that the rationale adopted by the Commission for applying the IRS rate in pole attachment complaint proceedings under Section 204 of the Act, 47 U.S.C. § 204, is equally applicable here. In Teleprompter of Fairmont v. C&P of West Virginia, 79 FCC 2d 232 (1980), the Commission stated

addition, we find that interest should begin to accrue from January 1, 1987, the day after which the 1985-1986 monitoring period ended. At that point, defendants were subject to the earnings limitations of a new monitoring period. Accordingly, we award interest calculated at the IRS rate for tax refunds[107] from defendants to American Sharecom from January 1, 1987 until the date of full payment to American Sharecom.

IV. CONCLUSION

52. We have carefully reviewed the extensive record before us and have found, to the extent indicated here, that complainant is entitled to an award of damages, plus accumulated interest on such damages, for Michigan Bell Telephone Company's, Pacific Bell Telephone Company's and Wisconsin Bell, Inc.'s violations of our rate of return prescription for the 1987-1988 monitoring period.

V. ORDERING CLAUSES

53. Accordingly, IT IS ORDERED, pursuant to Section 4(i), 4(j), 201, 206, 207, 208 and 209 of the Communications Act, as amended, 47 U.S.C. §§ 4(i), 4(j), 201, 206, 207, 208 and 209, that Michigan Bell Telephone Company SHALL PAY to American Sharecom, Inc., the sum of $4,324 (Four Thousand Three Hundred and Twenty-Four dollars) within 60 days after the release date of this Memorandum Opinion and Order; that Pacific Bell Telephone Company SHALL PAY to American Sharecom, Inc., the sum of $5,292 (Five Thousand Two Hundred and Ninety-Two dollars) within 60 days after the release date of this Memorandum Opinion and Order; and that Wisconsin Bell, Inc., SHALL PAY to American Sharecom, Inc., the sum of $8,609 (Eight Thousand Six Hundred and Nine dollars) within 60 days after the release date of this Memorandum Opinion and Order.

54. IT IS FURTHER ORDERED that the above-named Michigan Bell Telephone Company, Pacific Bell Telephone Company and Wisconsin Bell, Inc. SHALL PAY to American Sharecom, Inc. interest on the damages awarded here computed at the IRS rates set forth in Appendix A from January 1, 1987 until the date full payment is made.

55. IT IS FURTHER ORDERED that the Motion To Accept Complainant's Late Filed Interrogatory Responses filed by American Sharecom, Inc. on July 30, 1992 IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

As a matter of fairness, we believe that the rate of interest applied in a pole attachment complaint proceeding should be readily available, easily applied, and periodically revised to reflect changes in borrowing costs. In light of these considerations, we find the interest rate for federal tax refunds and additional tax payments suitable for use in this type of proceeding. This rate appears in a variety of easily obtained official and commercial publications, and is revised on a regular basis. [Footnote omitted.]

79 FCC 2d at 238.

[107] The applicable IRS rates are set forth in Appendix A.

APPENDIX A

Effective Period	Rate	Internal Revenue Service Citation
01/01/87 - 03/31/87	8%	Rev.Rul. 146, 1986-2 C.B. 208
04/01/87 - 06/30/87	8%	Rev.Rul. 87-23, 1987-13 I.R.B. 46
07/01/87 - 09/30/87	8%	Rev.Rul. 87-62, 1987-29 I.R.B. 10
10/01/87 - 12/31/87	9%	Rev.Rul. 87-87, 1987-36 I.R.B. 8
01/01/88 - 03/31/88	10%	Rev.Rul. 87-131, 1987-50 I.R.B. 6
04/01/88 - 06/30/88	9%	Rev.Rul. 88-17, 1988-10 I.R.B. 6
07/01/88 - 09/30/88	9%	Rev.Rul. 88-50, 1988-25 I.R.B. 39
10/01/88 - 12/31/88	10%	Rev.Rul. 88-86, 1988-41 I.R.B. 1
01/01/89 - 03/31/89	10%	Rev.Rul. 88-105, 1988-51 I.R.B. 4
04/01/89 - 06/30/89	11%	Rev.Rul. 89-36, 1989-1 C.B. 309
07/01/89 - 09/30/89	11%	Rev.Rul. 89-69, 1989-1 C.B. 310
10/01/89 - 12/31/89	10%	Rev.Rul. 89-99, 1989-2 C.B. 256
01/01/90 - 03/31/90	10%	Rev.Rul. 89-125, 1989-2 C.B. 257
04/01/90 - 06/30/90	10%	Rev.Rul. 90-19, 1990-1 C.B. 186
07/01/90 - 09/30/90	10%	Rev.Rul. 90-47, 1990-1 C.B. 187
10/01/90 - 12/31/90	10%	Rev.Rul. 90-71, 1990-35 I.R.B. 4
01/01/91 - 03/31/91	10%	Rev.Rul. 90-94, 1990-46 I.R.B. 16
04/01/91 - 06/30/91	9%	Rev.Rul. 91-20, 1991-11 I.R.B. 1
07/01/91 - 09/30/91	9%	Rev.Rul. 91-33, 1991-21 I.R.B. 1
10/01/91 - 12/31/91	9%	Rev.Rul. 91-50, 1991-37 I.R.B. 1
01/01/92 - 03/31/92	8%	Rev.Rul. 91-65, 1991-51 I.R.B. 1
04/01/92 - 06/30/92	7%	Rev.Rul. 92-21, 1992-14 I.R.B. 14
07/01/92 - 09/30/92	7%	Rev.Rul. 92-44, 1992-24 I.R.B. 86
10/01/92 - 12/31/92	6%	Rev.Rul. 92-77, 1992-38 I.R.B. 12

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

CCI RSA, Inc. File No. 10351-CL-P-333-A-88

For facilities in the Domestic Public
Cellular Radio Telecommunications Service
on Frequency Block A in Market 333
Arkansas 10 - Garland

MEMORANDUM OPINION AND ORDER

Adopted: February 16, 1993; Released: February 22, 1993

By the Chief, Mobile Services Division:

I. INTRODUCTION

1. Before the Mobile Services Division is a Petition to Defer Grant (Petition) filed April 24, 1992, on behalf of Chickasaw Telephone Company for the Benefit of CTC Scholarship Trust (Chickasaw/CTC Trust) concerning the above-referenced application of CCI RSA, Inc (CCI RSA). That application was selected in the cellular relottery for Market 333, Arkansas 10-Garland Rural Service Area (Arkansas 10 RSA) held by the Commission on November 6, 1991, and was later announced as tentative selectee. *See* Public Notice, Report No. CL-92-66 (released Mar. 25, 1992). The application that was selected in the initial lottery for the Arkansas 10 RSA, Chickasaw/CTC Trust, was found defective and dismissed by the Mobile Services Division (MSD). The dismissal was subsequently affirmed by the Common Carrier Bureau. Chickasaw/CTC Trust then filed an Application for Review which was denied by the Commission.[1]

2. The Petition requests deferral of the grant of the CCI RSA application pending the outcome of administrative and judicial review of the dismissal of the Chickasaw/CTC Trust application. CCI RSA and Chickasaw/CTC Trust have filed responsive pleadings.

II. DISCUSSION

3. In its Petition, Chickasaw/CTC Trust argues that deferral of a grant of the CCI RSA application is warranted to assure unprejudiced consideration of the claims of Chickasaw/CTC Trust regarding its own application. In situations of a cellular relottery, the Commission has stressed that there is no prejudicial effect because the determination of a grant of another application is expressly conditioned on the outcome of the proceeding involving the first application. The Commission has determined that there is no basis for a contention that adequate relief will not be provided to the applicant selected in the initial lottery in an RSA should that applicant ultimately prevail on the merits of its case seeking reversal of the dismissal of its application. *See Sunde Cellular Communications, Inc., et al., (Sunde Cellular)*, DA 93-20 (released Jan. 8, 1993). Therefore, we reject Chickasaw/CTC Trust's request to defer the grant.

4. The Petition also requests that, if the Commission determines that the grant should not be deferred, it place conditions on the grant as follows:

> (1) that, as contemplated by the Commission's statement in the notice announcing the relottery, grant of the application would be subject to and conditioned upon the Commission's dismissal action of Chickasaw/CTC Trust's application becoming a final order and no longer subject to administrative or judicial review. *See Lottery Notice*, Mimeo 14800 (released Sept. 19, 1991); and
>
> (2) that, any construction and operation of facilities pursuant to this grant of authority would be at the risk of CCI RSA, its successors and assigns and would confer upon CCI RSA, its successors and assigns no advantage, direct or indirect, of any nature whatsoever in connection with consideration of Chickasaw/CTC Trust's claims or decision whether to grant the Chickasaw/CTC Trust application.

5. With regard to the first requested condition on the grant of the relottery winner's application, we condition as a matter of course the grant of the application of a relottery winner on the final outcome of litigation to which the application of the initial lottery winner is subject. Therefore, given our practice, we need not consider this request made in the Petition.

6. As to the second requested condition, the Commission has already acted on the Chickasaw/CTC Trust Application for Review and denied it. Moreover, we reject the contention underlying the second condition that an advantage would somehow be conferred by the grant to CCI RSA in connection with consideration of the claims of Chickasaw/CTC Trust. When a relottery winner participates in the relottery, it is already on notice that a grant of an authorization to it would be conditioned on the outcome of an appeal. *See generally Sunde Cellular*, DA 93-20, at para. 7. Therefore, for the reasons set forth above, we have decided to deny the Petition.

III. ORDERING CLAUSE

7. Accordingly, the Petition to Defer Grant filed by Chickasaw Telephone Company for the Benefit of CTC Scholarship Trust IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

John Cimko
Chief, Mobile Services Division
Common Carrier Bureau

[1] *See Chickasaw Telephone Company for the Benefit of CTC Scholarship Trust*, 6 FCC Rcd 4990 (Com. Car. Bur. 1991), *review denied*, Memorandum Opinion and Order, FCC 92-568 (adopted Dec. 23, 1992, released Jan. 25, 1993).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 82-434

In the Matter of

Amendment of Part 76, Subpart J,
Section 76.501 of the Commission's
Rules and Regulations to Eliminate
the Prohibition on Common Ownership
of Cable Television Systems and
National Television Networks

MEMORANDUM OPINION AND ORDER

Adopted: February 5, 1993; Released: February 23, 1993

By the Commission: Chairman Quello issuing a separate statement; Commissioner Marshall not participating.

TABLE OF CONTENTS

	Paragraph
I. INTRODUCTION	1
II. DISCUSSION	
A. The Continued Validity of the Rule	2
B. Limits on Network-Cable Ownership	8
C. Remedies for Specific Cases of Anticompetitive Conduct	22
III. CONCLUSION	26
IV. ADMINISTRATIVE MATTERS	27

Appendix A -- List of Petitions and Responses

I. INTRODUCTION

1. This *Memorandum Opinion and Order* addresses issues (raised in petitions for reconsideration of the *Report and Order*[1] that amended Section 76.501(a)(1) of our rules, which prohibited common ownership of cable television systems and national television networks (the "network-cable cross-ownership" rule). Specifically, the *Report and Order* revised the rule to permit networks to own cable systems, provided that such combinations do not exceed ten percent of homes passed by cable nationwide, and fifty percent of homes passed by cable within a local market. We also established a process to resolve complaints from local broadcast stations that allege competitive harm by network-owned cable systems with respect to carriage or channel positioning.[2] Petitions for reconsideration were filed by the National Broadcasting Company, Inc. (NBC) and the Association of Independent Television Stations (INTV).[3] In this *Memorandum Opinion and Order*, we deny the petitions for reconsideration, thereby affirming our decision to permit broadcast networks to own cable systems subject to certain restrictions, including our limit on homes passed by a network-owned cable system within a local market. We also make no change in the remedies for specific cases of anticompetitive conduct, but rather will resolve the remaining concerns regarding carriage of local broadcast stations by network-owned cable systems in the proceeding that implements the must-carry provisions in Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992.[4]

II. DISCUSSION

A. The Continued Validity of the Rule

2. In the *Report and Order*, we stated that the cable industry has become a robust, independent enterprise, with over 10,000 systems and 80 networks offering an increasing diversity of programming that competes directly with over-the-air broadcast services. At the same time, in the midst of increasing competition from multichannel video services, the broadcast television networks face a growing need to generate additional revenues to respond to declining audience shares and advertising sources. Based upon these changes and our analysis of this proceeding's record, we found that the original rationale for the network-cable cross-ownership rule -- to prevent network dominance or undue concentration in the video marketplace, and to promote growth in the infant cable industry -- has been attenuated.[5] Moreover, we stated that

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[1] *See Report and Order*, 7 FCC Rcd 6156 (1992).

[2] After three years, the Commission will review the continued necessity of retaining the restrictions on the broadcast networks' ownership of cable systems that were adopted in the *Report and Order*.

[3] Parties filing in response to these petitions are listed in Appendix A.

[4] In November 1992, the Commission issued a *Notice of Proposed Rulemaking* regarding the must-carry aspect of the 1992 Cable Act. *See Notice of Proposed Rule Making* in MM Docket No. 92-259, FCC 92-499 (released Nov. 19, 1992) (*Must-Carry Notice*). The *Must-Carry Notice* requested comment on the effect of the 1992 Cable Act on the process for remedying specific cases of anticompetitive conduct by network-cable operators, and the extent that the more specific statutory carriage obligations supersede the requirements adopted in the network-cable cross-ownership proceeding.

[5] The Commission's policy rationale for the network-cable cross-ownership rule was illuminated in its discussion of the broadcast-cable cross-ownership rule, 47 C.F.R. § 76.501(a)(2), which was simultaneously adopted and which prohibits common ownership of local television stations and cable systems that serve the same area. *See also Second Report and Order*, 23 FCC 2d at 819; 39 FCC 2d at 391. According to this discussion, the principal concerns underlying the network-cable rule were that: (1) the networks could restrict the amount of competing programming supplied by their cable television systems due to their incentive to maximize the audience for their own network programming; (2) network-owned cable systems could refuse to carry a rival network's programming, thus hindering the

the rule may hamper competition by precluding three experienced market participants from owning cable systems, and by unnecessarily limiting the television networks' ability to diversify and generate other revenue streams. Indeed, most commenters agreed that the rule's original rationale is no longer sufficient to sustain a *per se* prohibition against network-cable cross-ownership. The *Report and Order* also pointed out that a number of independent parties and government agencies concluded that the rule is outdated, restrains competition and diversity in providing cable service, and lacks countervailing benefits.[6] Therefore, we revised the cross-ownership rule to permit significant entry into the cable industry by the broadcast networks, subject to certain constraints to address the concerns raised in this proceeding regarding possible anticompetitive or discriminatory practices by network-cable operators.

3. *Summary of Petitions and Comments.* INTV asserts that the *Report and Order* is inconsistent with prior Commission decisions regarding the precarious state of free, over-the-air television, and also contends that the Commission has created a situation that will lead to dangerous levels of horizontal concentration in local broadcast markets. INTV questions the importance of broadcast networks as a matter of public policy, noting that the traditional consideration underlying the networks' role is their ability to serve as a programming source for the free, over-the-air television system, of which the key component is the local television broadcaster. Moreover, INTV asserts that the networks would become a program service without their affiliates. It contends that the record lacks evidence that the networks will actually channel profits from operating cable systems to their affiliates, and it predicts instead that the profits will remain in the cable operations. INTV also observes that the *Report and Order* concludes that a broadcast network's vertical integration into cable would create economies of scale and would encourage the development of additional cable programming services. Assuming this result, INTV argues that program "by-passing" of affiliates will increase with the relaxed rule, as networks will direct programming toward the new cable program channels that they develop. INTV concludes that the incentive to abandon the off-air system will increase as cable subscribership grows, cable advertising revenues increase, and the demographics of non-cable households become less attractive.[7] INTV further argues that the Commission must view its decision to relax the cross-ownership rule in the context of the revised financial interest and syndication rules.[8] Specifically, INTV asserts that "off-network" syndicated programming could move directly to a new network-owned cable service rather than remaining available to independent broadcast stations. INTV concludes that the *Report and Order* inconsistently argues that relaxed network-cable rules will not increase the networks' incentives to bypass the broadcast system with programming, while simultaneously stating that vertically integrated combinations will foster new cable networks.[9]

4. Capital Cities/ABC, Inc. (ABC) continues to support total elimination of the cross-ownership rule but does not seek reconsideration of the Commission's decision. ABC notes its strong opposition to the INTV petition and asserts that the relaxed rule will strengthen network companies and the broadcast services they provide by making networks more efficient competitors in the increasingly competitive video marketplace.[10] ABC argues that INTV misinterprets the Commission's decision by assuming that the strength that the networks would gain from owning cable systems is solely a result of cable operations subsidizing the network. Instead, ABC asserts that the goal of network entry into cable ownership is to balance long-term profitable network operations that are inherently risky with long-term profitable cable operations that have far less risk.[11] Similarly, NBC states that the different network and cable businesses are likely to complement and support each other, leading to better and more diverse program services to both cable subscribers and broadcast television viewers.[12] ABC also criticizes INTV's assumption that development of new cable network program services would lead to favoring cable distribution over the broadcast network. ABC argues that INTV fails to realize that not all programming developed by the broadcast networks will be distributed nationally, because a network could decide to offer niche cable programming that would not be sufficiently popular for national audiences. Thus, ABC states that INTV incorrectly assumes that development and placement of any programming on network-owned cable systems would constitute "bypassing" of the broadcast distribution system.[13]

5. *Decision.* We continue to find that significant changes in the video marketplace have undermined the network-cable cross-ownership rule's original rationale. We further conclude that the record evidence in this proceeding and INTV's petition for reconsideration fail to present a new rationale sufficient to warrant a *per se* prohibition on network ownership of cable systems. Thus, we affirm our decision to permit the broadcast networks to own cable systems subject to certain constraints to address concerns regarding possible anticompetitive or discriminatory practices by network-cable operators.

6. The *Report and Order* emphasized that the changing structure of the video marketplace is well-documented, with over 10,000 cable systems now operating in the United States, compared to 2,490 systems in 1970 when the

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development of new cable networks and limiting network competition nationwide; and (3) networks could enhance their dominance in supplying television programming by owning cable systems, thus limiting the diversity of voices in the video marketplace.

[6] *See Report and Order* at 6159.

[7] INTV Petition at 2-5.

[8] On November 5, 1992, the U.S. District Court for the Seventh Circuit vacated the Commission's decision relaxing and modifying the financial interest and syndication rules. *See Schurz Communications, Inc., et al., v. Federal Communications Commission and the United States of America,* Nos. 91-2350, *et al.,* slip opinion (7th Cir., November 5, 1992), and *modified,* (December 7, 1992). *See also Second Further Notice of Proposed Rulemaking* in MM Docket No. 90-162, released December 31, 1992.

[9] INTV Petition at 5-6.

[10] ABC Opposition at 1-3. NBC observes that the broadcast networks are already engaged in arrangements for joint program development with cable programmers -- such as relationships involving NBC and HBO, or ABC and Nickelodeon -- and that cross-ownership will make such joint efforts easier, more financially attractive and more common. NBC Petition at 4, n.2.

[11] *Id.* at 4.

[12] NBC Opposition at 2-4.

[13] ABC Petition at 9-10.

rule was adopted. Today's cable systems reach over 90% of the nation's households, and serve over 60% of homes passed.[14] We continue to believe, as discussed in the *Report and Order*, that allowing networks to own cable systems, subject to our revised rules, could affirmatively promote competition in the video marketplace and provide other public interest benefits. Furthermore, the *Report and Order* stated that the opportunities for significant network entry into cable ownership are also important in view of the many technological and service innovations that appear to be imminent in the cable industry, while also observing that cable service has previously benefited from vertical integration between system operators and programmers.[15]

7. Throughout this proceeding, we have recognized arguments raised by parties seeking to retain the rule that large cable multiple system owners (MSOs) and the broadcast networks control many of the outlets for distributing programming in the video marketplace. We are not persuaded, however, that an absolute prohibition against network-cable cross-ownership is necessary in order to protect competition and diversity. Rather, we find that the various concerns of possible anticompetitive practices by network-owned cable systems are mitigated by our decision to impose measured structural limits on network entry into the cable industry. Furthermore, we find that INTV's arguments that the networks could "bypass" local broadcast stations with their programming -- or off-network syndicated programming -- raise no new issues in this proceeding and were thoroughly evaluated in the *Report and Order*, and are mitigated by the limits we have adopted on network-cable ownership.[16]

B. Limits on Network-Cable Ownership

8. Although the *Report and Order* concluded that the absolute prohibition against network-cable cross-ownership was no longer in the public interest, we recognized certain commenters' concerns that network-cable operators could conceivably use their enhanced leverage in the video marketplace to harm local broadcast stations through certain discriminatory practices against non-affiliated stations or through "bypassing" affiliated stations and distributing network programming directly through the cable system. Therefore, we adopted limited structural measures designed to protect competition and diversity in the video marketplace. The revised rule permits networks to own cable systems, provided that such combinations do not exceed (i) 10% of homes passed by cable nationwide, and (ii) 50% of homes passed by cable within an ADI. We also stated that the local limit will not apply to instances where the network-owned cable system faces a "competing" system, because direct competition between a cable system and another multichannel provider will further reduce the possibility of anticompetitive conduct by network-cable owners. The *Report and Order* stated that the national ownership limit would permit reasonable opportunities for network entry into cable, while also allowing for growth to increase the potential benefits to the public from diversified network investments.[17] Similarly, we concluded that the 50-percent local limit would address commenters' concerns pertaining to dominance by network-cable combinations and anticompetitive conduct, emphasizing that the limit prevents network-cable owners from completely controlling the cable systems in any ADI and reduces any incentives for discriminatory conduct.

9. *Summary of Petitions and Comments.* With respect to limiting network ownership of cable systems, NBC's petition states that the revised cross-ownership rule contains provisions that will severely reduce the possibility that networks could enter the cable industry to any meaningful extent. NBC claims that these restrictions, combined with the prohibition on common ownership of co-located cable systems and television stations, will so severely limit a network's ability to acquire cable systems that it is unlikely that the public interest benefits identified in the *Report and Order* will ever occur. NBC states that the most logical way for networks to enter the cable business is to buy or invest in an existing MSO; however, the 50-percent local ownership limit makes such arrangements virtually impossible. NBC claims that the limits, in tandem with the broadcast-cable cross-ownership ban, would require a network to divest large portions of the systems it would acquire from most major MSOs. NBC also submits data that purports to show that the practical effect of the combined restrictions on network cable ownership is to preclude network deals with all but a few of the top 25 MSOs.

10. Conversely, INTV's petition recommends reducing the 50% local cap to 25%, and states that the 50% local cap lacks a rational justification. INTV claims that some of the systems listed by the Commission in the *Report and Order*[18] could be purchased under a 25% limit, which INTV previously recommended, while others could not be purchased under the 50% limit.[19] INTV asserts, therefore, that the Commission's selection of a 50% cap appears arbitrary. INTV argues that the Commission has not discussed the evidence submitted by INTV and the Network Affiliated Stations Alliance (NASA) regarding the tremendous acquisition potential for networks with just a 25% cap, which according to INTV would allow the networks to purchase 13 of the top 50 MSOs passing 6.5 million households.[20] INTV further points out that the Commission's 50% cap was based on a balancing of two conflicting issues: the Commission wanted to ensure that the networks had sufficient opportunity to acquire cable systems under relaxed rules, but it was also concerned with granting the networks too much control in local markets. INTV contends that the Commission has given too much weight to relaxing the rule rather than properly analyzing

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[14] *See Report and Order* at 6162.

[15] *Id.* at 6164. The 1992 Cable Act directs the Commission to consider and adopt rules governing circumstances where vertical integration and horizontal concentration of ownership may harm competition and diversity in the video marketplace. *See* Cable Television Consumer Protection and Competition Act of 1992 at Sections 11 and 13; *see also Notice of Proposed Rulemaking and Notice of Inquiry*, MM Docket No. 92-264, 8 FCC Rcd 210 (1992).

[16] *See* discussion of limits on network ownership, *infra*. *See also Report and Order* at 6168.

[17] In this regard, the *Report and Order* stated that we will consider waivers for network-cable combinations in excess of the 10% national ownership standard pursuant to our normal waiver standards. *See Report and Order* at 6168.

[18] *See Report and Order* at 6169, n.45.

[19] INTV Petition at Appendix A.

[20] INTV Petition at Appendix B.

the potential concentration issue, especially in view of the record evidence demonstrating that a 25% local cap would not overly restrict network acquisition of cable systems.

11. ABC responds that INTV has overstated the theoretical business opportunities a relaxed rule provides, and claims that INTV failed to recognize the broadcast-cable cross-ownership ban when analyzing possible network acquisition of cable MSOs and thus overestimated the true number of potential business opportunities. Moreover, to say there are some systems that networks could theoretically buy is not the same as saying that viable or real business opportunities have been created. In order to create real opportunities for networks, ABC notes, more than a handful of theoretical possibilities for network acquisition of cable systems must exist, as the Commission has previously recognized.

12. The Network Affiliated Stations Alliance (NASA) opposition states that the local cap does not unduly restrict network entry into cable ownership. NASA states that the record shows that a substantial number of "meaningful" cable companies could be acquired intact by the networks under a 50% cap. Moreover, NASA claims that it is not uncommon for MSOs to purchase and sell individual systems or operating subsidiaries. INTV, in its opposition, disputes NBC's method for factoring in the broadcast-cable cross-ownership ban when presenting its scenario as to how many potential MSOs could be acquired by networks. INTV maintains that the broadcast-cable cross "ownership ban is absolutely irrelevant to the Commission's concern regarding network cable cross-ownership[21] because the policy was enacted for all markets. INTV also claims that the fact that the networks may be prevented form acquiring systems in certain markets due to another rule is not germane to this proceeding.

13. With respect to basing the limits on network entry on "homes passed" by a network-cable operator, NBC claims that the Commission has chosen an inappropriate and unworkable measure for calculating the local limit, as well as the ten-percent national limit. NBC states that "homes passed" is the wrong measure as a matter of policy, given the Commission's stated rationale for ownership limits. NBC acknowledges the Commission's concern that if network owned systems reach too many homes in a given market or nationally, the network may be able to exert undue influence over viewer access to competing programming sources. NBC contends, however, that network cable owners cannot control or influence access to competing programming sources in homes that do not subscribe to the network-owned system. NBC states, therefore, the appropriate question is not what percentage of total actual or potential cable homes a network can reach on its own systems, but what percentage of total television households may be susceptible to the effects of any network discriminatory practices by virtue of its cable ownership.

14. NBC further states that it is impossible to determine accurately the number of homes passed by cable in any given market or nationally because existing data sources often report vastly different estimates of homes passed.[22] Therefore, neither a prospective network cable purchaser nor the Commission has any way to obtain accurate information on homes passed. NBC suggests that a more rational and accurate approach to calculate the local and national ownership limits would be to compare the network-owned cable system subscribers to the number of television households in a particular market or nationwide, in the calculation's numerator and denominator, respectively. NBC maintains that these particular numbers are accurately reported and generally consistent among existing data sources.

15. NBC objects to the Commission's rejection of a subscriber-based measurement, stating that the Commission feared a subscriber test could discourage network-owned cable systems from adding subscribers and that a subscriber threshold was fundamentally less stable than a homes passed measure. NBC contends that since the rule is applied only at the time of network acquisition of a system, a network-cable owner would have no reason to refrain from adding more subscribers. Moreover, NBC claims that it would be economically counterproductive for a non-network cable operator to refrain from adding subscribers on the chance that, in the future, a network may not be able to buy its system. NBC claims that, even if this concern were justified, it would apply with equal force to a homes passed measurement -- a network-cable owner might refrain from fully building out a franchise area for fear it would cross the homes passed threshold. NBC points out that most franchise agreements prohibit a cable system operator from refusing service to any household passed by the system, and further require operators to fully build out a franchise within a certain period of time. In addition, NBC states that because the test is applied only at the time a network purchases a system, the alleged stability of a homes passed versus a subscriber measurement is irrelevant. Moreover, because the homes passed measurement is constantly affected by new construction, the building out of the franchise as well as rebuilds, such a measure is no more stable than a subscriber measure. Thus, NBC states that the Commission's rationale for rejecting a subscriber test does not withstand scrutiny.

16. NBC recommends that the Commission eliminate the local limit on network cable ownership, or, alternatively, revise both the local and national ownership limits to permit networks to acquire systems in which the number of subscribing households do not exceed (1) 50% of television households within an ADI, and (2) 10% of all U.S. television households. As a second alternative, and regardless of whether the number of homes passed or the number of subscribers is used to measure the extent of network-cable cross-ownership, NBC suggests revising the rules to compare such network-cable ownership levels to ADI/national television households, rather than ADI/national homes passed.

17. INTV and NASA oppose NBC's attempt to change the "homes passed" benchmark to a "subscriber" measure. NASA states that adopting NBC's manipulation of the proposed standard would vitiate the Commission's local ownership cap by virtually doubling, on average, the number of subscribers that could be served by a network-cable entity, and both INTV and NASA claim that

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[21] As for NBC's claim that the broadcast-cable cross-ownership ban is a relevant bar to network entry into cable ownership, NASA asserts that NBC could divest itself of one or more of its TV stations to acquire one of the otherwise forbidden MSOs.

[22] NBC submits data which shows the reported number of homes passed by cable in several individual markets from two different sources disagree by as much as 100%. NBC Petition at Exhibit III.

the "homes passed" standard is more stable and is not inherently more difficult to ascertain with accuracy than either subscribers or total households. The sources for this information are, they note, the same cable systems or franchising authorities that provide all the data. INTV further points out that NBC's criticism of the "homes passed" standard would apply with greater force to a subscriber-based standard and that NBC implicitly acknowledges the accuracy and availability of such data by using it in its own petition.

18. *Decision.* We affirm the structural limits on network ownership of cable systems as adopted in the *Report and Order*, and we reject the petitions that were filed seeking reconsideration of the 50-percent local limit. Given the concerns raised in this proceeding regarding the potential for anticompetitive actions by network-cable owners, we continue to believe that the limits are a necessary constraint on network entry at this time in order to mitigate the incentives for practices that could harm the public interest or local broadcast stations. In particular, the local limit should mitigate the major concerns that were raised in this proceeding regarding bypassing of local broadcast stations with programming, as well as other potential problems concerning carriage or channel positioning, because a network could not purchase enough cable systems in a market to reach an area equivalent to the reach of the local broadcast station. In this regard, we reiterate that network-cable operators that encompass only a portion of an ADI market, or an area smaller than the affiliate's coverage, would arguably have incentives to treat affiliates and other local broadcast stations no less favorably than non-network owned cable systems.[23] We maintain that local caps are necessary at the outset of this rule change and are preferable to the behavioral restrictions that were proposed or suggested by commenters. Moreover, as we stated in the *Report and Order*, the local ownership limit will provide an opportunity for us to evaluate whether network-owned cable systems operate any differently than cable systems owned by other entities. Furthermore, we believe that the local limit will balance the public benefits that are attainable through network entry into the cable industry with our decision to prevent complete control by a particular network-cable entity within a given local market, which is arguably the locus of a cable system's power.

19. With respect to the 50-percent threshold, we reject INTV's claim that the local limit is too high and allows excessive network entry. We emphasize that we intended that the local limit, along with the national limit, as adopted in the *Report and Order*, impose an effective constraint on network ownership of cable systems by allowing a certain degree of entry while alleviating any threat of anticompetitive conduct by the networks. Moreover, we are not persuaded that any of the potential cross-ownership opportunities as represented in the record -- either certain combinations between a broadcast network and particular MSOs, or scenarios for entry in specific local markets -- would necessarily limit competition and diversity in the video marketplace.[24] We also agree with NBC's observation that the broadcast-cable cross-ownership rule currently serves as a significant accompanying restriction on network entry into the cable industry, such that acquisitions in certain major local markets are precluded where a network already owns and operates a local broadcast station. Furthermore, we continue to believe that, unlike the 25% threshold INTV has advocated, the 50% measure will not create an undue obstacle to network entry and growth in most ADIs, yet it will provide essentially the same check on conduct by network-owned cable systems as the more stringent standard.[25] As a related issue, INTV has argued that the 50-percent limit was arbitrarily established due to questions regarding examples cited in the *Report and Order*. We reemphasize that the respective examples were offered to illustrate that the local limit would permit a network to purchase at least some of those systems, or other systems within those ADIs, thus demonstrating that the measure allows reasonable entry subject to an effective limit.

20. Next, concerning NBC's argument that the 50-percent threshold is too restrictive, we recognize that certain potential network-cable combinations are precluded by our standard. We observe, however, that many acquisitions remain possible, including mergers of a network and a large MSO. For instance, INTV's arguments regarding the many potential opportunities under the 50-percent cap demonstrate that the structural limits should permit at least some degree of meaningful entry, even allowing for an adjustment for the broadcast-cable provision, into the cable industry by broadcast networks.[26] Again, we underscore that the local limit established in the *Report and Order* was intended to balance opportunities for entry with a reasonable ownership limit to address concerns for possible anticompetitive behavior, and that the limit takes full account of the conflicting statistical information placed in the record of this proceeding. We also reiterate that the primary concerns raised in the record focused on network-cable dominance and potential anticompetitive conduct and, in this regard, we emphasize that the 50% local limit will prevent network-cable owners from completely controlling the cable systems in any ADI while simultaneously reducing the likelihood of discriminatory conduct.

21. We also believe that the "homes passed" standard adopted in the *Report and Order* offers a stable and logical constraint on a network's ownership of cable within an ADI. In the *Report and Order*, we recognized that a base of "cable subscribers" may be more readily measurable than the "homes passed" base. However, we continue to find that a subscriber-based test -- especially in the context of applying both national and local ownership standards -- is fundamentally less stable as compared to a measure defined by "homes passed," given the relatively frequent changes in cable subscribership. We also point out that even NBC's petition for a subscriber-oriented threshold acknowledges the importance of restraining network-owned cable systems from reaching too many homes in a given market or nationally. Therefore, we believe that a comparatively stable base is necessary as a point of reference for comparing acquisitions by a particular network, as well as those transactions involving different broadcast networks, over a period of time. As a result, to the extent that information for both measures is available, we find that the

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[23] *See Report and Order* at 6169.
[24] *See* INTV Petition at Appendix A and B.
[25] *See Report and Order* at 6169.
[26] We note that INTV has commented that the revised rule would permit a network to acquire 13 of the top 50 MSOs. *See* summary of INTV's comments, *supra*.

difference in actual opportunities for acquisition or entry are not sufficient to warrant use of a subscriber-oriented standard. Moreover, we believe that NBC's proposed standard would not truly measure the factors contributing to market dominance by network-cable operators, while the "homes passed" measure will more successfully preclude potential by-passing and other carriage-related practices, which could conceivably occur only as a result of the potential households covered by an entity.

C. Remedies for Specific Cases of Anticompetitive Conduct.

22. In order to deal further with the potential for any anticompetitive conduct, the *Report and Order* adopted a remedial scheme to address specific instances of discriminatory actions by network-owned cable systems. Specifically, we required that network-owned cable operators who drop or reposition a station for anticompetitive reasons must restore the station to its prior carriage status. The *Report and Order* established procedures to govern the complaint process, including a requirement that a cable operator give a broadcaster 30 days' notice before repositioning or deleting its station. We provided that whenever a local broadcast station believes that it has suffered or will suffer competitive harm as a result of being dropped or repositioned by a network-owned cable system, the station may seek special relief from the Commission pursuant to Section 76.7 of the Commission's Rules. The *Report and Order* also listed several factors the Commission will consider in evaluating a petition for special relief, including whether the cable system dropped a station in favor of another station in which it has a financial interest, whether the network-owned cable operator bypassed the local network affiliate and provided network programming on its own, whether the programming decision was supported by subscriber surveys, and the current ratings of the station as compared with its ratings before being dropped from the cable system.[27]

23. *Summary of Petitions and Comments.* INTV asserts that the Commission's adoption of expedited complaint procedures is an inadequate *post hoc* remedy against abuses that could arise as a result of the relaxed network-cable cross-ownership rule. INTV contends that permitting a network to own cable systems gives that network considerable leverage over its affiliates and other competitive television stations, and notes that the Commission's *Cable Report* held that cable operators' incentives to deny carriage or reposition channels in which they have no financial interest appears to be particularly great as against local broadcasters.[28] Moreover, INTV asserts, because cable demand is inelastic, channel removal or repositioning would not cause the system to lose a significant number of subscribers.[29] INTV further takes issue with the requirement that the deletion or repositioning in question must cause harm, and argues that all such actions significantly harm a broadcast station. In addition, INTV is critical of the criteria set forth in the *Report and Order* for evaluating complaints. For example, INTV notes that the ratings impact of repositioning or dropping a station may not be readily apparent, and argues that the number of subscriber complaints is difficult to verify and has no relation to the devastating economic impact on the station.[30]

24. In its Opposition to NBC's Petition, which does not discuss negative must-carry, INTV argues that the must-carry and channel positioning provisions of the new Cable Act supersede the Commission's "negative must-carry" approach.[31] Similarly, NAB and NBC assert that the "negative must-carry" rule is superseded by the 1992 Cable Act.[32] NASA submits that regardless of any challenge to the 1992 Cable Act, it is important that must-carry and channel positioning attempts by network-cable entities be resolved and urges the Commission to adopt additional behavioral safeguards.[33]

25. *Decision.* We continue to be satisfied with the efficacy of the remedial provisions we adopted in the *Report and Order*. At this time, however, we will neither affirm nor repeal the provision in light of the 1992 Cable Act, which directs the Commission to adopt must-carry rules for commercial and non-commercial broadcast stations.[34] We emphasize that, when adopted, the new must-carry rules could arguably supersede the provisions adopted in this proceeding.[35] Until those rules are adopted, however, we will retain the current procedures for remedy.[36]

III. CONCLUSION

26. In this *Memorandum Opinion and Order*, we deny the petitions for reconsideration, thereby affirming our decision to permit broadcast networks to own cable systems subject to certain restrictions. In particular, we affirm our prior decision to allow broadcast networks to acquire cable systems provided that such combinations do not exceed (i) 10% of homes passed by cable nationwide, and (ii) 50% of homes passed by cable within an ADI. We also make no change in the remedies we adopted to resolve specific cases of anticompetitive conduct, and defer the question of whether such remedies are superseded by the must-carry provisions of the 1992 Cable Act for our pending proceeding that will implement those statutory rules.

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[27] *See Report and Order* at 6170-74.

[28] *See Report* in MM Docket No. 89-600, 5 FCC Rcd 5045 (1990).

[29] INTV Petition at 9-15.

[30] *Id.* at 19-22. INTV also questions the procedures established by the Commission. INTV argues that several of the elements necessary to make a *prima facie* case are beyond the reach of the local broadcaster, and asserts that Section 76.7 provides no discovery mechanism. *Id.* at 22-24.

[31] INTV Opposition at 16-17.

[32] NAB Opposition at 3; NBC Opposition at 10.

[33] NASA Opposition at 12-13.

[34] *See* discussion of *Must Carry Notice* at n.4, *supra*.

[35] The *Must-Carry Notice* specifically seeks comment on the extent to which the 1992 Cable Act takes precedence over the remedies for specific cases of anticompetitive conduct adopted in this proceeding. *See Must-Carry Notice* at n.49.

[36] We note that the must-carry provisions of the Cable Act are currently before the U.S. Court of Appeals for the D.C. Circuit.

IV. ADMINISTRATIVE MATTERS

Regulatory Flexibility Act

27. Pursuant to the Regulatory Flexibility Act of 1980, the Commission included a final analysis in the *Report and Order* detailing (i) the need for and purpose of the rules, (ii) the summary of issues raised by public comment in response to the initial regulatory flexibility analysis, Commission assessment, and changes made as a result, and (iii) significant alternatives considered and rejected. No substantive changes have occurred pertaining to the final analysis as a result of the petitions for reconsideration.

V. ORDERING CLAUSES

28. Accordingly, IT IS ORDERED that the Petitions for Reconsideration filed by the Association of Independent Television Stations and the National Broadcasting Company, Inc. ARE DENIED.

29. Further information on this proceeding may be obtained by contacting James Coltharp, (202) 632-6302, Policy and Rules Division, Mass Media Bureau.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

List of Petitioners and Responses

Petitioners

1. Association of Independent Television Stations (INTV)
2. The National Broadcasting Company, Inc. (NBC)

Oppositions

1. INTV
2. NBC
3. Capital Cities/ABC, Inc. (ABC)
4. Network Affiliated Stations Alliance (NASA)

Comments

1. National Association of Broadcasters (NAB)

Separate Statement of Commissioner James H. Quello.

In the Matter of Amendment of Part 76, Subpart J, Section 76.501 of the Commission's Rules and Regulations to Eliminate the Prohibition on Common Ownership of Cable Television Systems and National Television Networks.

I fully agree with the Commission's decision to relax the network-cable cross-ownership rules in recognition of "significant changes in the video marketplace." *Memorandum Opinion and Order* ¶ 5. This change hopefully will provide the opportunity for broadcast networks to provide competition with established cable operators.

At the time of our initial decision, I dissented from that portion of the *Report and Order* that adopted "negative must carry" as a means of preventing potential abuse. In addition to what I saw as the shortcomings of this safeguard, I noted that it was uncertain whether or not the Cable Act would be enacted. It was. And along with it, positive must carry requirements.

We raise in this *MO&O*, but do not answer, the question of what effect the 1992 Cable Act has on the negative must carry rules reaffirmed here. While the Commission will determine in another proceeding whether the Act supersedes the negative must carry safeguards, I thought I should clarify my position in light of my previous position.

I objected to negative must carry when it was proposed as the only behavioral safeguard against possible anticompetitive practices. My concerns dissipate to the extent it is a supplemental remedy. Obviously, stations that gain affirmative must carry rights under the Cable Act are unlikely to seek whatever protection negative must carry may offer. But it is possible that stations opting for retransmission consent may need to rely on negative must carry as a backstop under certain circumstances.

Accordingly, my view is that the 1992 Cable Act does not supersede the behavioral safeguards adopted here. My previous concerns about negative must carry are moot to the extent it is a backup remedy.

I fully support the *Memorandum Opinion and Order*.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NCR CORPORATION NAL No. 216sr0002nal

ORDER ON FORFEITURE

Adopted: January 20, 1993; Released: February 22, 1993

By the Chief, Domestic Facilities Division:

1. On March 18, 1992, NCR Corporation (NCR) was issued a Notice of Apparent Liability (NAL) for the unlicensed operation of a Ku-band transmit/receive earth station in the amount of $5600.[1] Subsequently, NCR filed a Response to Notice of Apparent Liability requesting that the Commission rescind or reduce the amount of the forfeiture previously assessed.[2]

2. In support of its request, NCR points to three reasons why the NAL should be rescinded or reduced. First, NCR states that the Commission did not appropriately credit NCR for voluntary disclosure of the unlicensed facility. Second, NCR asserts that the Commission failed to take into account NCR's long history of compliance with Commission licensing rules and regulations. Finally, NCR notes that the NAL failed to give consideration to the minor nature of NCR's violation.

3. In August 1991, the Commission released a *Policy Statement* establishing standards for assessing forfeitures and subsequently denied various petitions for reconsideration of the standards.[3] In *Standards*, the Commission set base forfeiture amounts for violations of Commission rules and regulations. In addition, *Standards* allowed for upward and downward adjustments to forfeitures based on a number of factors. The downward adjustment criteria includes voluntary disclosure of the violation, history of overall compliance, minor violation and inability to pay. NCR was assessed a forfeiture of $5600 in accordance with the criteria established in *Standards*.

4. *Voluntary Disclosure*. Contrary to NCR's assertion, voluntarily disclosure of the unlicensed facility was taken into account in determining the amount assessed in the NAL. As set forth in *Standards*, a 30 percent reduction was made in the base forfeiture amount of $8000 resulting in an assesment of $5600.

5. *Overall History of Compliance*. Although NCR's initial submission[4] briefly mentioned that, historically, NCR has been a responsible and productive Commission licensee, this factor was not fully discussed. In its Response, however, NCR provides additional information as to its overall history of compliance with Commission rules and regulations. Based on this history, NCR asks that a 20 to 50 percent downward adjustment be made to its forfeiture assessment. Based on NCR's representations concerning its overall history of compliance with Commission rules and consistent with *Standards*, we agree that a reduction is warranted. Therefore, we will reduce the base amount of $8000 by 20 percent.

6. *Minor Violation*. NCR states that the NAL failed to take into consideration the "minor" nature of NCR's violation. In NCR's Response, it asserts that the failure to obtain a license for this facility was an administrative oversight and no incidences of interference were reported. Therefore, according to NCR, the violation should be considered "minor" in nature. We do not agree. First, the station was in operation for several years before NCR corrected the oversight. Also, while no interference occurred, as stated in the NAL, "NCR's operations violated one of the Commission's most fundamental requirements, that of licensing transmission equipment." Under these circumstances, no reduction in the amount of the forfeiture will be made.

7. Accordingly, pursuant to Section 0.291 of the Commission's rules on delegations of authority, IT IS ORDERED that, pursuant to Section 503 of the Communications Act of 1934, 47 U.S.C. § 503 and Section 1.80(f)(4) of the Commission's Rules, 47 C.F.R. § 1.80(f)(4), NCR Corporation IS LIABLE FOR FORFEITURE in the amount of $4000 for unlicensed operation of transmission facilities in violation of Section 301 of the Communications Act, 47 U.S.C. § 301.

8. IT IS FURTHER ORDERED that, pursuant to Section 503(b) of the Communications Act, 47 U.S.C. § 503(b), and Section 1.80 of the Commission's rules, 47 C.F.R. § 1.80, NCR Corporation FORFEIT to the United States the sum of Four Thousand Dollars ($4000.00) for the violation of Section 301 of the Communications Act. Payment of the forfeiture may be made by mailing a check or similar instrument to the Commission within thirty (30) days of release of this Order to: Federal Communications Commission, P.O. Box 73482, Chicago, IL 60673-7482.

9. IT IS FURTHER ORDERED that, if the forfeiture payment is not made within thirty days, the case may be referred to the Department of Justice for collection, pursuant to Section 504(a) of the Communications Act, 47 C.F.R. § 504(a).

10. IT IS FURTHER ORDERED that a copy of this Order BE SENT to NCR Corporation, 1700 South Patterson Boulevard, Dayton, OH 45479, William H. Talmage, Esq., by Certified Mail, Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

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[1] *See* Letter from Chief, Domestic Facilities Division to Chief Counsel, NCR Corporation (March 18, 1992).

[2] *See* Letter from Counsel, NCR Corporation to Chief, Domestic Facilities Division (April 10, 1992) (*Response*).

[3] *See Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. denied*, 7 FCC Rcd 5339 (1992) (*Standards*) (established guidelines for assessing forfeitures).

[4] *See* letter from Chief Counsel, NCR Corporation (April 29, 1991) (requesting Special Temporary Authority).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-26

In re Applications of

SPECTRUM BROADCASTING CO. (hereafter "Spectrum")	File No. BPH-911031MC
STEVEN L. GRADICK (hereafter "Gradick")	File No. BPH-911031MD
JEFFREY P. DAVIS	File No. BPH-911031ME
TERRY C. JENKS	File No. BPH-911031MF

For Construction Permit for a
New FM Station on Channel 288A
in Bowdon, Georgia

HEARING DESIGNATION ORDER

Adopted: February 2, 1993; Released: February 24, 1993

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. Gradick is the permittee of WCKS(FM) in Fruithurst, Alabama. Gradick has indicated his intent to terminate his relationship with WCKS(FM) in the event of grant of the referenced application. Accordingly, in the event of grant of Gradick's application, Gradick will be required to sever all connection with WCKS(FM) prior to the commencement of program test authority.

3. Our engineering study indicates that Spectrum failed to address the matter of how they propose to resolve any RF exposure to workers on their tower. Gradick responded to this issue, however, his response did not adequately address the issue. *See* 47 C.F.R. § 1.1307(b). Specifically, Gradick states, "[s]hould it become necessary for workers or other authorized personnel to enter the restricted area and climb the tower, the applicant verifies that appropriate measures will be taken to assure that no exposure to radiofrequency radiation in excess of the ANSI radiofrequency protection guides will occur." The applicants should specifically explain what steps will be taken to limit the radiofrequency radiation exposure to workers allowed access to the site. Consequently, we are concerned that both Spectrum and Gradick may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). *See also, Public Notice* entitled "Further Guidance for Broadcasters Regarding Radiofrequency Radiation and the Environment" (released January 24, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. Section 1.1307 states that an EA must be prepared if the proposed operation would cause exposure to workers or the general public to levels of RF radiation exceeding specific standards. Since Spectrum and Gradick inadequately indicated how workers engaged in maintenance and repair would be protected from exposure to levels exceeding the ANSI guidelines, each will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. *See generally,* OST Bulletin No. 65 (October, 1985) entitled "Evaluating Compliance With FCC-Specified Guidelines For Human Exposure to Radiofrequency Radiation," at 28. Therefore Spectrum and Gradick will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.,* 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.,* 83 FCC 2d 337 (1980). In the event the Mass Media Bureau determines, based on its analysis of the Environmental Assessments, that the applicants' proposals will not have a significant impact upon the quality of the human environment, the contingent environmental issue shall be deleted and the presiding judge shall thereafter not consider the environmental effects of the proposal. *See* 47 C.F.R. § 1.1308(d).

4. Gradick petitioned for leave to amend his application on March 17, 1992, April 24, 1992, and August 14, 1992. The accompanying amendments were filed after March 2, 1992, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

5. Data submitted by the applicants indicate that there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to Spectrum and Gradick in which it is concluded that the proposed facility is likely to have an adverse effect on 33the quality of the environment, to determine whether the proposals are consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That Gradick shall sever all connection with WCKS(FM), Fruithurst, Alabama, prior to the commencement of program test authority.

9. IT IS FURTHER ORDERED, That in accordance with paragraph 3 hereinabove, Spectrum and Gradick shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

10. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Gradick ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

11. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington D.C. 20554.

12. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order. Pursuant to Section 1.325(c) of the Commission's Rules, within five days after the date established for filing notices of appearance, the applicants shall serve upon the other parties that have filed notices of appearance the materials listed in: (a) the Standard Document Production Order (see Section 1.325(c)(1) of the Rules); and (b) the Standardized Integration Statement (see Section 1.325(c)(2) of the Rules), which must also be filed with the presiding officer. Failure to so serve the required materials may constitute a failure to prosecute, resulting in dismissal of the application. *See generally Proposals to Reform the Commission's Comparative Hearing Process* (Report and Order in Gen. Doc. 90-264), 6 FCC Rcd 157, 160-1, 166, 168 (1990), *on reconsideration*, FCC 91-154, paras. 7-8 & n.3, Appendix paras. 3 & 5, released May 15, 1991.

13. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN NETWORK EXCHANGE, INC.,
COMMUNICATIONS SERVICES, INC.,
COMMUNIGROUP OF K.C., INC.,
LONG DISTANCE SERVICE, INC.,
METROMEDIA LONG DISTANCE, INC.,
NATIONAL TELESERVICES, INC.,
RCI NETWORK SERVICES, INC.,
SCHNEIDER COMMUNICATIONS, INC.,
TELAMARKETING CORP. OF LOUISIANA,
RCI USA, and
WESTEL, INC.,
Complainants,

v.

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, and	File No. E-91-146
SOUTH CENTRAL BELL TELEPHONE COMPANY,	File No. E-91-147
Defendants.	

ORDER

Adopted: February 12, 1993; Released: February 23, 1993

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On September 27, 1991, RCI Network Services, Inc. (RCI) and Communigroup of K.C., Inc. (Communigroup), along with other complainants, filed the above-captioned formal complaint against Southern Bell Telephone and Telegraph Company, and South Central Bell Telephone Company (BellSouth) seeking damages resulting from BellSouth's alleged violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988. On February 2, 1993, however, RCI filed a motion for partial dismissal and on February 8, 1993, Communigroup also filed a motion for partial dismissal. RCI and Communigroup both state that a mutually agreeable settlement had been reached between the parties.

2. We are satisfied that dismissal of the complaint will serve the public interest by eliminating or reducing the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated under Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that RCI and Communigroup's Motions for Partial Dismissal ARE GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED to the extent it relates to the claims of RCI and Communigroup.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN NETWORK EXCHANGE, INC.,
COMMUNICATIONS SERVICES, INC.,
COMMUNIGROUP OF K.C., INC.,
DIAL 'N SAVE, INC. (T/A DIAL AMERICA),
LONG DISTANCE SERVICE, INC.,
METROMEDIA LONG DISTANCE, INC.,
NATIONAL TELESERVICES, INC.,
RCI NETWORK SERVICES, INC.,
TELAMARKETING CORP. OF LOUISIANA,
TOTAL-TEL USA,
VALU-LINE OF THE LEHIGH VALLEY, INC.
(T/A CHADWICK VALU-LINE), and
WESTEL, INC.,
Complainants,

v.

THE BELL ATLANTIC TELEPHONE COMPANIES,
Defendants.

File No. E-91-135

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Enforcement Division
Common Carrier Bureau

ORDER

Adopted: February 12, 1993; Released: February 23, 1993

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On September 27, 1991, Total-Tel USA (Total-Tel), along with other complainants, filed the above-captioned formal complaint against The Bell Atlantic Telephone Companies (Bell Atlantic) seeking damages resulting from Bell Atlantic's alleged violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988. On February 2, 1993, however, Total-Tel and Bell Atlantic filed a joint motion for partial dismissal stating that a mutually agreeable settlement had been reached between the parties.

2. We are satisfied that dismissal of the complaint will serve the public interest by eliminating or reducing the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated under Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that Total-Tel and Bell Atlantic's Joint Motion for Partial Dismissal IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED to the extent it relates to the claims of Total-Tel.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WILLIAMS TELECOMMUNICATIONS GROUP, INC.,
Complainant,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY,
Defendant.

File No. E-89-399

ORDER

Adopted: February 11, 1993; Released: February 23, 1993

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On September 28, 1989, Williams Telecommunications Group, Inc. (WTG) filed the above-captioned formal complaint against Southwestern Bell Telephone Company (SWBT) seeking damages resulting from SWBT's alleged violations of the Commission's rate of return prescription for the period October 1, 1985 through December 31, 1986. On January 28, 1993, however, WTG filed a motion to dismiss the complaint with prejudice stating that the parties have reached a full and complete settlement and there is no further reason to proceed in this matter.

2. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that Complainant's Motion to Dismiss with Prejudice IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Network Exchange, Inc. — **CC Docket No. 91-365**

One Call Communications, Inc. — **CC Docket No. 91-371**

ORDER

Adopted: December 23, 1992; Released: February 23, 1993

By the Commission:

1. On December 23, 1991, the Common Carrier Bureau issued orders directing the above-referenced operator service providers (OSPs) to demonstrate the reasonableness of their rates and to announce at the beginning of each call handled by the OSP that its rates are available on request.[1] The Bureau imposed these requirements after reviewing the OSPs' rates and concluding that those rates appeared to be unjust and unreasonable. On January 22, 1992, the captioned OSPs filed applications for the review of the *Rate Review Orders* directed to them.[2] The applications for review challenge the Bureau's imposition of an announcement requirement and the Bureau's conclusion that petitioners' rates appear unjust and unreasonable. Petitioners also assert that the Bureau's action denied them due process. One Call Communications, Inc. (One Call) contends that the order violates the provisions and intent of the Telephone Operator Consumer Services Improvement Act of 1990, 47 U.S.C. Section 226(a) *et seq.* No responsive pleadings were filed.

2. In the interim, American Network Exchange, Inc. (Amnex) and One Call filed reduced rates. The Common Carrier Bureau has accordingly terminated the proceedings with respect to Amnex and One Call. *See* One Call Communications, Inc., CC Docket No. 91-371, 7 FCC Rcd 1448 (Com.Car.Bur. 1992); and American Network Exchange, Inc., CC Docket 91-365, released November 9, 1992, (DA 92-1444). Therefore, the applications for review filed by Amnex and One Call are dismissed as moot.

3. Accordingly, IT IS ORDERED that the applications for review submitted by American Network Exchange, Inc. and One Call Communications, Inc. ARE DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[1] American Network Exchange, Inc., CC Docket No. 91-365, 7 FCC Rcd 163 (Com.Car.Bur. 1992); and One Call Communications, Inc., CC Docket No. 91-371, 7 FCC Rcd 200 (Com.Car.Bur. 1992) (*Rate Review Orders*).

[2] Each of the pleadings was captioned "Application for Expedited Review."

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

SDK ENTERPRISES File No. MSD-92-42

Licensee of Domestic Public Cellular Radio
Telecommunications Service Stations
KNKN624 and KNKN546

ORDER

Adopted: February 17, 1993; Released: February 23, 1993

By the Chief, Mobile Services Division:

1. SDK Enterprises (SDK) is the licensee of the captioned stations in the Domestic Public Cellular Radio Telecommunications Service, on frequency Block A (nonwireline). In November 1992, SDK brought to the Commission's attention information about an apparent unauthorized *pro forma* transfer of control by SDK's partners. The Mobile Services Division (Division) initiated an investigation into this matter.

2. The Division and SDK have reached an agreement which would terminate the Division's investigation. The terms and conditions of this agreement are contained in the attached Consent Decree.

3. We have reviewed the terms of the Consent Decree and evaluated the circumstances of this case. We believe that the public interest would be served by approving the Consent Decree, the terms of which are incorporated herein by reference.

4. Accordingly, IT IS ORDERED that the Consent Decree attached to this Order IS ADOPTED.

5. IT IS FURTHER ORDERED that the Division's investigation of SDK Enterprises IS TERMINATED.

6. IT IS FURTHER ORDERED that this Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

John Cimko
Chief, Mobile Services Division
Common Carrier Bureau

CONSENT DECREE

I. INTRODUCTION

1. This is a Consent Decree (the "Decree") between the Chief of the Mobile Services Division ("Division") and SDK Enterprises ("SDK").

2. Under the terms of this Consent Decree, SDK agrees to make a voluntary payment totalling $5,000 for deposit into the United States Treasury, and the Division terminates its investigation into the matters alleged in this proceeding.

II. BACKGROUND

3. SDK is the licensee of Station KNKN624, Market No. 569A, North Carolina 5 - Anson Rural Service Area (RSA); and Station KNKN546, Market No. 681A, Virginia 1 - Lee RSA in the Domestic Public Cellular Radio Telecommunications Service, on frequency Block A (non-wireline). On November 25, 1992, Sally D. King (King), SDK's Managing General Partner, filed a statement advising the Commission that, effective May 27, 1992, SDK's partners had executed an amendment to their original partnership agreement (the First Amendment). The First Amendment removed certain restrictions on the powers of the Managing General Partner and increased the Managing General Partner's responsibilities for partnership expenses and losses and, under certain circumstances, the share of proceeds from the sale of partnership assets. Under the terms of the original partnership agreement, the Managing General Partner had power to conduct the affairs of the partnership but certain major actions such as selling the partnership's assets required the approval of a majority in interest of the partners. The Managing General Partner held a 10 percent economic and voting interest in SDK, and three other partners individually held a 60 percent, 15 percent, and 15 percent interest, respectively.

4. The SDK partners entered into a Second Amendment which rescinded the expansion of the Managing General Partner's powers, in effect, reinstating the prior authority provisions of the original partnership agreement. The Second Amendment also specified that partnership voting power would be as originally agreed upon.

5. On December 4, 1992, the staff of the Division advised counsel to SDK that the Division was investigating whether the execution of the First Amendment constituted an unauthorized transfer of control under Section 310 of the Act. The staff invited counsel to SDK to submit further information concerning this matter, and counsel did so on December 7 and 14, 1992. The Division has reviewed all the materials submitted by SDK.

III. DEFINITIONS

6. For the purposes of this Decree, the following definitions apply:

(a) "SDK" means SDK Enterprises or any of its successors in interest.

(b) "Order" means an order of the Mobile Services Division adopting the terms and conditions of this Decree.

(c) "Final Order" means an Order of the Division that is no longer appealable or subject to administrative or judicial reconsideration, review, appeal, or stay.

IV. AGREEMENT

7. SDK admits the jurisdiction of the Commission over it, and the subject matter of this action for purposes of this Decree and the Order adopting this Decree. All necessary jurisdictional facts are hereby admitted for purposes of this Decree.

8. SDK waives any rights it may have to judicial review, appeal, or rights otherwise to challenge or contest the validity of any Order adopting this Decree. SDK agrees that upon signing by SDK and the Division, the provisions of this Decree shall be incorporated by reference in the Order formally adopting this Decree.

9. This Decree is for purposes of settlement only, and its signing does not constitute an admission by SDK of any violation of law, rules, or policy.

10. In consideration for the Division's entering into this Decree and in order to avoid any disruption of service to the public, to conserve Commission resources, and in order to avoid litigation costs, SDK hereby agrees to the following terms:

(a) SDK will make a voluntary payment to the United States Treasury, without further protest or recourse, in the amount of $5,000, within five days after the Order adopting this Decree becomes a Final Order.

(b) SDK agrees that the contribution of $5,000 to the United States Treasury may not be claimed as a tax deduction.

(c) The failure of SDK to comply with these terms will be considered a failure of compliance with this Decree.

11. In light of the covenants and representations contained in this Decree, and in express reliance thereon, the Division will terminate its investigation of SDK. Such termination is without a finding by the Division of wrongdoing by SDK. Further, the Division will not institute, on its own motion, any proceedings against SDK based upon the information obtained during the investigation. The Division will not conduct further proceedings of any kind based on the matters raised or investigated herein unless information beyond that made available in this proceeding and which warrants inquiry is presented.

12. SDK agrees that any violation of the Order or this Decree shall constitute a separate violation of a Commission order, entitling the Commission to exercise any rights and remedies attendant to the enforcement of a Commission order.

13. If this Decree is not signed by the Division and SDK, or is otherwise rendered invalid by any court of competent jurisdiction, it shall become null and void and may not be used in any fashion in a legal proceeding.

14. If the Commission, or the United States on behalf of the Commission, brings an action in any United States District Court to enforce the terms of the Order incorporating the terms of this Decree, SDK agrees that it will not contest the validity of the Order, will waive any statutory right to a trial *de novo*, and will consent to a judgment incorporating the terms of this Decree.

FEDERAL COMMUNICATIONS COMMISSION
COMMON CARRIER BUREAU
MOBILE SERVICES DIVISION

John Cimko, Chief

SDK ENTERPRISES

Sally D. King
Managing General Partner

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MIDAMERICAN LONG DISTANCE COMPANY,
Complainant,

v.

PACIFIC BELL TELEPHONE COMPANY,	File No. E-89-406
MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, and	File No. E-89-407
NORTHWESTERN BELL TELEPHONE COMPANY,	File No. E-89-408

Defendants.

MEMORANDUM OPINION AND ORDER

Adopted: January 29, 1993; Released: February 22, 1993

By the Commission:

TABLE OF CONTENTS

Topic	Paragraph No.
I. INTRODUCTION	1
II. BACKGROUND	2 - 4
III. DISCUSSION	5 - 45
A. Liability for Damages	5 - 16
1. Contentions of the Parties	5 - 11
2. Discussion	12 - 16
B. Damages and Interest Claims	17 - 45
1. Damages	18 - 42
a. Contentions of the Parties	18 - 28
b. Discussion	29 - 42
2. Interest on Damages	43 - 45
a. Contentions of the Parties	43 - 44
b. Discussion	45
IV. CONCLUSION	46
V. ORDERING CLAUSES	47 - 54

I. INTRODUCTION

1. In this Memorandum Opinion and Order we find that MidAmerican Long Distance Company (MidAmerican) has met its burden of establishing that the defendant local exchange carriers (LECs) have violated Section 201(b) of the Communications Act by earning in excess of the rate of return prescribed by the Commission for the period October 1, 1985 through December 31, 1986. In addition, we award MidAmerican damages and interest for defendants' rate of return violations.

II. BACKGROUND

2. The Commission has previously held that LECs who had earned in excess of the prescribed rate of return for October 1, 1985 through December 31, 1986 violated Section 201(b) of the Communications Act (the "Act").[1] These decisions firmly establish that carrier rates producing earnings in excess of the Commission's prescribed rate of return violate Section 201(b) of the Act[2] and allegations of such overearnings are sufficient to sustain a cause of action under Section 208 of the Act.[3] Furthermore, the Commission has held that complainants may recover damages, including interest, from LECs who violated the Commission's rate of return prescription.[4]

3. While a detailed accounting of the applicable statutory scheme and relevant Commission and court decisions that preceded the filing of the captioned complaints is set forth in the *MCI Liability Order*[5] and will not be repeated here, a very brief review of the relevant rate of return prescription is helpful. The Commission prescribed a rate of return of 12.75 percent for the initial monitoring period of October 1, 1985 through December 31, 1986.[6] Because the initial review period would be only 15 months rather than the two years of subsequent review periods, the Commission

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[1] MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co., *et al.*, 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon. denied*, 5 FCC Rcd 3463 (1990) (*MCI Reconsideration Order*) (jointly "*MCI Orders*"), *appeal dismissed sub nom. Mountain States Tel. and Tel. Co., et al. v. FCC*, 951 F.2d 1259 (10th Cir. 1991) (per curiam); and American Telephone and Telegraph Co. v. Northwestern Bell Telephone Co., 5 FCC Rcd 143 (1990), *appeal dismissed sub nom. Mountain States Tel. and Tel. Co., et al. v. FCC*, 951 F.2d 1259 (10th Cir. 1991) (per curiam).

[2] 47 U.S.C. § 201(b). This Section provides, in pertinent part, that "[a]ll charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful."

[3] 47 U.S.C. § 208.

[4] MCI Telecommunications Corporation v. Pacific Bell Telephone Company, *et al.*, FCC 93-70 (released February 8, 1993) (*MCI Damages Order*).

[5] *MCI Liability Order*, 5 FCC Rcd at 217-18.

[6] *See* Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985) (*Phase I Order*), *on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,103 (Apr. 1, 1986) (*Phase I Reconsideration*), *on further reconsideration*, 2 FCC Rcd 190 (1987) (jointly "*Phase I Orders*"). *See also* Procedures and Methodologies to Establish Reporting Requirements, CC Docket No. 86-127, FCC 86-514 (released Dec. 3, 1986), 52 Fed. Reg. 273 (Jan. 5, 1987).

expanded the "buffer"[7] that would be used during this initial monitoring period to determine whether the prescription had been violated.[8] Carriers were given notice that a 13.10 percent level of earnings would be the maximum allowable rate of return on overall interstate earnings and 13.25 percent would be the maximum allowable return for any access service category.[9]

4. In September 1989, MidAmerican filed eight formal complaints[10] against the LECs alleging violation of the Commission's rate of return prescription.[11] In addition, MidAmerican reserved the right to file supplemental complaints for damages as provided for in Section 1.722 of the Commission's rules[12] because it could not determine the precise amount of damages it suffered at the time its complaints were filed. The defendants all filed answers; MTN and NWB filed a joint motion to dismiss.[13] On June 9, 1992, the Common Carrier Bureau (Bureau) released an order establishing discovery and briefing schedules.[14] Pursuant to the *Discovery Order*, the parties submitted their initial briefs and reply briefs setting forth their respective claims and arguments.[15]

III. DISCUSSION

A. Liability For Damages

1. Contentions of the Parties

5. MidAmerican alleges that the rates it paid for certain of the defendants' interstate access services during the period from October 1, 1985 through December 31, 1986 were unjust and unreasonable in violation of Section 201(b) of the Act. MidAmerican supports its allegations with evidence taken from reports filed with the Commission by the defendants for the 15-month period at

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[7] *See MCI Liability Order*, 5 FCC Rcd at 217:

> ... the Commission established both an authorized rate of return and a 'spread' or 'buffer' above that return for use in proceedings relating to the enforcement of the prescription. In other words, the authorized return would be employed in computing tariff rates; the spread, or buffer, would be used in combination with the authorized return 'to determine whether a rate of return prescription had been violated.' [footnote omitted.]

[8] *Phase I Order*, 50 Fed. Reg. at 41,352 (para. 21).

[9] 47 C.F.R. § 65.701(b).

[10] Five of the complaints have since been settled with the LECs involved. *See* MidAmerican Long Distance Company v. The Chesapeake and Potomac Telephone Companies and New Jersey Bell Telephone Company, 7 FCC Rcd 5101 (Com.Car.Bur. 1992); MidAmerican Long Distance Company v. Michigan Bell Telephone Company and Wisconsin Bell Telephone Company, 6 FCC Rcd 1401 (Com.Car.Bur. 1991); MidAmerican Long Distance Company v. Southwestern Bell Telephone Company, 5 FCC Rcd 4103 (Com.Car.Bur.1990).

[11] The remaining defendants are Mountain States Telephone and Telegraph Company (MTN), Northwestern Bell Telephone Company (NWB) (collectively "USWC"), and Pacific Bell Telephone Company (Pacific Bell).

Due to the similarity of the issues and arguments raised by the remaining parties, the complaints have been consolidated for disposition. These complaints were held in abeyance by the Commission pending resolution of a court remand in *Illinois Bell Tel. Co. v. FCC*, 911 F.2d 776 (D.C. Cir. 1990). *See* MidAmerican Long Distance Company v. The Chesapeake and Potomac Telephone Companies, *et al.*, 6 FCC Rcd 642 (Com.Car.Bur. 1991) (*Abeyance Order*). MidAmerican filed an application for review of the *Abeyance Order* on March 7, 1991. Pacific Bell filed an opposition to the application for review. MidAmerican filed a reply with an unopposed motion for acceptance of late-filed pleadings. The Commission acted on the remand in October 1991. *See* Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, Decision on Remand, CC Docket No. 86-497, 7 FCC Rcd 296 (1991), *appeal docketed sub nom. Illinois Bell Telephone Co., et al. v. FCC*, No. 90-1020 (D.C. Cir. Jan. 11, 1991). On December 13, 1991, the Bureau released an order that reactivated the instant cases. *See* Order, 6 FCC Rcd 7296 (Com.Car.Bur. 1991). That action makes MidAmerican's application moot and, accordingly, we dismiss the application.

[12] 47 C.F.R. § 1.722.

[13] Pacific Bell filed an answer, but did not file a motion to dismiss. MidAmerican filed an unopposed motion to accept late-filed pleading with a reply to Pacific Bell's answer. In its motion, MidAmerican established good cause for the late filing and, therefore, the motion is granted and the pleading accepted.

On February 13, 1992, USWC filed a supplement to its motion to dismiss (USWC Supplement). MidAmerican filed an opposition on February 25, 1992, and USWC replied on March 6, 1992. We will accept the USWC Supplement for filing since MidAmerican has had opportunity to respond.

[14] MidAmerican Long Distance Company v. The Chesapeake and Potomac Telephone Companies, *et al.*, 7 FCC Rcd 3581 (Com.Car.Bur. 1992) (*Discovery Order*). MidAmerican served interrogatories on Pacific Bell and USWC on June 19, 1992. Pacific Bell responded on July 8, 1992, and USWC responded on July 16, 1992 with an erratum filed on August 24, 1992. USWC served interrogatories on MidAmerican to which MidAmerican responded on July 16, 1992 with a supplemental response on August 13, 1992. MidAmerican filed its briefs on July 29, 1992 (MidAmerican/Pacific Bell Br., MidAmerican/MTN Br., and MidAmerican/NWB Br.) with an erratum to the MidAmerican/NWB Br. filed on July 30, 1992. The defendants filed their briefs on July 29, 1992 (Pacific Bell Br. and USWC Br.). MidAmerican filed its reply briefs on August 10, 1992 (MidAmerican/Pacific Bell RBr. and MidAmerican/USWC RBr.). Pacific Bell filed its reply brief on August 10, 1992 (Pacific Bell RBr.), and USWC filed its reply brief on August 13, 1992 (USWC RBr.). MidAmerican filed an unopposed motion for leave to file a supplemental damages calculation in the proceeding against Pacific Bell. We will grant the motion and accept the filing.

[15] As a preliminary matter, we note that USWC has stated that it filed its brief directly with the Commission because it could find no order delegating damages authority to the Bureau. In addition, USWC formally objects if the Bureau is deciding these cases under delegated authority because it contends that the Bureau has been performing investigative and prosecutorial functions in these proceedings and cannot, under Section 554(d) of the Administrative Procedure Act (5 U.S.C. § 554(d)), act as decision maker here. USWC Br. at 2, n.7. While we agree with USWC that the damages issue must be decided by the Commission, 47 U.S.C. § 155(c)(1), the Bureau may deal with interlocutory matters such as discovery issues. We also disagree with USWC's characterization of the Bureau's activities regarding these complaint proceedings. The Bureau has at all times been acting as the "decision maker" and not as an "investigator" or "prosecutor."

issue that show that defendants achieved earnings in excess of the Commission's prescribed rate of return on one or more of the three interstate access categories established for the purpose of enforcing that rate of return prescription.[16]

6. MidAmerican requests that the Commission declare that the defendant LECs' charges for the period from October 1, 1985 through December 31, 1986 are in violation of the rate of return prescription and Section 201(b) of the Act, and order the defendant LECs to pay damages to MidAmerican equal to the difference between the amount actually paid by MidAmerican for interstate access service during the period and the amount that MidAmerican would have paid if the defendants' charges earned no more than the maximum allowable rate of return, plus interest.

7. The defendants raise a number of issues that have been fully considered by the Commission in the *MCI Orders*. They will be briefly discussed below.[17]

8. Defendants advance a variety of arguments to support their claim that MidAmerican has failed to state a cause of action under the Act. Primarily, the defendants argue that MidAmerican's claims are barred by *American Telephone and Telegraph v. FCC*.[18] These arguments take on several forms. Pacific Bell contends that renaming a "refund" as a "damage award" does not cure the inconsistencies the court found with respect to the automatic refund rule and allow the awarding of damages in the instant complaints.[19] The defendants argue that the Commission must consider underearnings in determining whether particular overearnings are in violation of the Act.[20] Finally, the defendants argue that it is contrary to *AT&T v. FCC* to find a rate of return violation when overall earnings for interstate access service did not exceed 13.10 percent regardless of access category earnings in excess of 13.25 percent.[21]

9. Defendants also argue that the Commission is engaging in retroactive ratemaking should it order a carrier to make refunds solely because the carrier has exceeded the authorized rate of return.[22] Additionally, Pacific Bell argues that the Commission's action in CC Docket No. 84-800 did not create a private cause of action that would permit an individual remedy.[23] MTN and NWB also argue that rates charged in conformity with a lawfully filed tariff cannot then be found to be unjust and unreasonable merely because they later proved to be too profitable.[24]

10. Each of the defendants argues that all of MidAmerican's claims are barred by Section 415 of the Act, which establishes a two-year statute of limitations on the filing of complaints.[25] According to the defendants, Section 415 bars the recovery of any damages if sought more than two years after the occurrence of any overearnings, in this case, thus barring all recovery sought after December 31, 1988.[26]

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[16] The interstate access service categories are special access, common line, and switched traffic sensitive. *See* 47 C.F.R. § 65.702 (1990). MidAmerican states that the monitoring reports recite that for the period October 1, 1985 through December 31, 1986, Pacific Bell earned a return of 14.51% in the switched traffic sensitive category; MTN earned returns in the switched traffic sensitive category of 14.60% in Arizona, 14.97% in New Mexico, 13.67% in Utah and 14.93% in Wyoming; and NWB earned returns in the special access category of 13.85% in Minnesota and 16.01% in North Dakota and earned returns in the switched traffic sensitive category of 14.64% in Iowa, 14.33% in Minnesota, 15.79% in Nebraska and 19.71% in North Dakota.

[17] The issues and arguments raised by Pacific Bell and USWC in response to MidAmerican's claims are essentially identical. For the sake of convenience and clarity, we will refer to defendants' arguments as if they are part of the same pleading. To the extent that individual defendants raise separate or unique arguments, we will address them separately.

[18] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court invalidated the Commission's procedure to enforce its rate of return prescriptions through automatic refunds of carrier overearnings to customers. For a detailed discussion of *AT&T v. FCC*, *see MCI Liability Order*, 5 FCC Rcd at 221-223. The U.S. Court of Appeals for the Sixth Circuit, relying on *AT&T v. FCC*, vacated a Commission order dealing with refunds of earnings in excess of the authorized rate of return for the special access category over a period of years in the context of a strategic pricing investigation. *See Ohio Bell v. FCC*, 949 F.2d 864 (6th Cir. 1991) (*Ohio Bell*). The court primarily relied upon the statement from *AT&T v. FCC* that a rate of return prescription is both a minimum and a maximum prescription. *See AT&T v. FCC*, 836 F.2d at 1390. The Commission has clarified, however, that it does not view a rate of return prescription as both a maximum and a minimum and has stated that

> [o]ur accumulated experience with rate of return prescriptions, and our review of the cost of capital evidence in this proceeding, convince us that there is no such point. * * * We believe there is a substantial gap between an earnings level that is fully adequate to assure attraction of capital on favorable terms, and an earnings level which, if sustained over time, would be confiscatory.

Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, 5 FCC Rcd 7507, 7532 (1990), *appeal docketed sub nom. Illinois Bell Telephone Co., et al. v. FCC*, No. 90-1020 (D.C. Cir. Jan. 11, 1991).

[19] *See* Pacific Bell Br. at 8.

[20] *See, e.g.*, MTN and NWB's Joint Answer, Affirmative Defenses and Motion to Dismiss (MTN and NWB Joint Motion) at paras. 17-18.

[21] *See, e.g.*, Pacific Bell Br. at 6. Extending this argument even further, MTN and NWB contend that the key rate of return with which MidAmerican should be concerned is the overall earnings of USWC in the aggregate, not the individual categorical earnings of USWC's subsidiaries. In the aggregate, USWC earned 12.73% overall. MTN and NWB Joint Motion at para. 16.

[22] *See, e.g.*, USWC Br. at 7. Pacific Bell argues specifically that under *Illinois Bell Telephone Co. v. FCC*, 966 F.2d 1478 (D.C. Cir. 1992) (*Illinois Bell*), the Commission may only engage in prospective ratemaking when the investigative and accounting requirements of §204(a) have not been met. Pacific Bell Br. at 10-11.

[23] Pacific Bell Br. at 14-17.

[24] MTN and NWB Joint Motion at para. 19.

[25] Section 415 provides, in pertinent part, that "[a]ll complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after...." 47 U.S.C. § 415(b). The term "overcharges" is defined in Section 415 "to mean charges for services in excess of those applicable thereto under the schedules of charges lawfully on file with the Commission." 47 U.S.C. § 415(g).

[26] *See* MTN and NWB Joint Motion at para. 20; Pacific Bell Answer at para. 17.

11. Defendants also argue that the decision in *Ohio Bell*, issued after the release of the *MCI Liability Order*, requires dismissal of MidAmerican's complaints.[27] According to the defendants, *Ohio Bell* reaffirms the proposition established in *AT&T v. FCC* that the Commission cannot award damages for carrier overearnings without allowing the carrier to re-coup or off-set underearnings.[28] Defendants contend that these propositions are not confined to the Commission's ratemaking activities under Sections 204-205 of the Act[29] but are equally applicable when the Commission decides private complaints for damages under Section 208 of the Act.

2. Discussion

12. We have carefully examined the record before us and conclude that the defendants, all of whom were defendants in the MCI complaint proceedings, have cited no facts and have made no arguments here that would warrant a ruling contrary to the *MCI Orders*.

13. *Failure to State a Cause of Action:* In the *MCI Liability Order*, we rejected identical claims made by the same defendants and held that *AT&T v. FCC* establishes no precedent that bars an individual complainant from seeking a remedy under Section 208 of the Act for damages based on a carrier's reported overearnings.[30] We stated that

> we are not persuaded by defendants' claims that earning in excess of prescribed rate of return does not violate that Act or, if it does, that the Commission *is required* to take a carrier's underearnings as well as its overearnings into account in determining whether a violation has occurred.
>
> * * * * * * *
>
> We find that a valid prescription bound the defendants to a maximum earnings limitation, and the defendants admit that they earned in excess of the amount during the period in question.[31]

We found further that *AT&T v. FCC* did not govern Section 208 complaint proceedings. The Commission has the authority to order a carrier to pay damages if a complainant meets the burden of establishing both a violation of the Act and the actual injury.[32]

14. In addition, we have previously held that enforcement of a rate of return prescription is not retroactive ratemaking because the obligation being enforced was set prospectively when the prescription was adopted.[33] Defendants have not persuaded us to alter our decision. We have also rejected the contention that rates charged in conformity with a lawfully filed tariff cannot be unjust and unreasonable.[34] We point out that the issue is not the lawfulness of high profits in the abstract, but the lawfulness of profits in excess of a prescription. Accordingly we hold that, taking into account the buffer, profits in excess of a prescription are unjust and unreasonable.

15. *Statute of Limitations:* MidAmerican is correct in its assertion that it had until September 30, 1989 to file its complaints based on monitoring reports filed by defendants with the Commission on September 30, 1987.[35] We have previously held that the date of the filing of the final monitoring report is dispositive with regard to the date a complainant discovers the right or wrong or the facts on which such knowledge is chargeable as a matter of law.[36] Defendants have made no argument that persuades us to alter this holding. Section 415 does not bar MidAmerican's complaints.

16. *Ohio Bell:* We disagree with the defendants' claim that *Ohio Bell* and *AT&T v. FCC* compel us to dismiss MidAmerican scomplaints. As we emphasized in the *MCI Liability Order* and reaffirmed in the *MCI Damages Order*, automatic refunds and refunds ordered under Section 204 of the Act are different from individual actions for damages under Section 208. Unlike the automatic refund mechanism in *AT&T v. FCC* or the refund procedure in *Ohio Bell*, both of which resulted from rulemaking proceedings initiated at the Commission's discretion, individual actions for damages under Section 208 are initiated by private parties seeking damages for injuries to themselves; those private parties have the burden of establishing both a violation of the Act and actual injury.[37] The courts in *AT&T v. FCC* and *Ohio Bell* did not discuss private complaints for damages; they did not invalidate private actions for damages; and their holdings are not applicable to the different separately authorized complaint procedure set forth in Sections 206-209. Accordingly, those decisions do not require us to depart from our holding in the *MCI Liability Order* that defendants have violated the

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[27] USWC Supplement at 3; Pacific Bell Br. at 6-8.

[28] Pacific Bell Br. at 7.

[29] 47 U.S.C. §§ 204-205.

[30] *MCI Liability Order*, 5 FCC Rcd at 222-23.

[31] *Id.* at 223 [emphasis in the original].

[32] *Id.* at 222-23.

[33] *Id.* at 222. We reject Pacific Bell's claim that the decision in *Illinois Bell* somehow leaves the Commission only with Section 205 authority in the face of a violation of our rate of return prescription. As we explained in the *MCI Damages Order*, *Illinois Bell* addresses the Commission's authority under Section 204, not Section 208. *See MCI Damages Order* at para. 27.

[34] *MCI Liability Order*, 5 FCC Rcd at 222.

[35] MidAmerican cites to the Bureau's Show Cause Orders in both the AT&T and MCI proceedings to support its argument. *See, e.g.*, MCI Telecommunications Corp. v. Michigan Bell, *Order to Show Cause*, 4 FCC Rcd 6099, 6101, n.8 (Com.Car.Bur. 1989). This holding was subsequently adopted by the Commission. *See MCI Liability Order*, 5 FCC Rcd at 224-25.

[36] In the *MCI Liability Order* we stated: the defendants filed the rate of return monitoring reports which . . . were developed by the Commission for several purposes, including making information about carrier earnings public[ly] available. Moreover, the monitoring reports relied on by MCI in its complaints were specifically designated by the Commission as a "final" and conclusively binding determination of a carrier's earnings.

5 FCC Rcd at 225. We note further that we have held that Section 415 (e) is inapplicable to the type of complaints we deal with here. Section 415 (e) concerns a carrier's liability to its customers for failure to transmit a message in accordance with its common carrier obligations. The instant complaints deal with the lawfulness of defendants' rates, not defendants' transmissions or obligations to transmit messages properly. Reconsideration Order, 5 FCC Rcd at 3464.

[37] *See MCI Liability Order*, 5 FCC Rcd at 222-23.

Communications Act by earning in excess of a valid rate of return prescription, thereby making their rates unjust and unreasonable under Section 201 of the Communications Act and themselves liable for damages to the extent a complainant can establish that it was damaged as a result of the violation.[38]

B. Damages and Interest Claims

17. MidAmerican's damages claims rest primarily on the contention that the proper measure of damages it incurred as a result of the defendants' rate of return prescription violations is the difference between the amounts it actually paid the defendants for interstate access services during the October 1, 1985 through December 31, 1986 monitoring period and the amount it would have paid if the defendants' rates produced earnings that did not exceed the Commission's prescription. The defendants, however, have raised a number of challenges to MidAmerican's damages claims, including a number of arguments that were previously considered and rejected by the Commission in the *MCI Liability Order* and the *MCI Damages Order*. We address the parties' contentions below.

1. Damages

a. Contentions of the Parties

18. As referenced above, MidAmerican's damages claims rest primarily on the contention that the proper measure of the damages it incurred as a result of defendants' violations is the difference between the amount it actually paid defendants for interstate access services during the October 1, 1985 through December 31, 1986 period and the amount it would have paid if the defendants' rates had produced earnings that did not exceed the Commission's prescribed rate of return. In the *Discovery Order*, the Bureau stated that it tended to agree, in principle, that a possible measure of the damages stemming from defendants' rate of return violations could be that difference.[39] The Bureau was not persuaded on the record before it, however, that a damages determination based solely on such a measure necessarily reflected actual damages incurred by MidAmerican.[40] The defendants were invited to submit evidence that could serve to mitigate or otherwise reduce MidAmerican's damages claims. Specifically, the Bureau stated that evidence demonstrating that MidAmerican's share of excessive earnings realized in a particular access category by a defendant could be offset or otherwise reduced due to facts and circumstances surrounding MidAmerican's purchase of other interstate access services from such defendant for the relevant monitoring period might be relevant.[41]

19. MidAmerican contends that it should be awarded damages of $15,696 from Pacific Bell and $361,151 from USWC, exclusive of interest.[42] MidAmerican states that the data underlying these calculations were taken from defendants' Forms 492, defendants' responses to discovery, and from MidAmerican's own records.[43] To derive the stated amounts, MidAmerican first calculated, for each study area and access service category in which a defendant's earnings exceeded the rate of return prescription of 12.75% plus .50% buffer, the maximum allowable category earnings by multiplying the rate base by the maximum allowable category rate of return over the period reflected in the Monitoring Report. MidAmerican then subtracted this amount from the category operating income shown on the Monitoring Report to determine the after-tax overearnings. To determine the pre-tax overearnings, MidAmerican divided the after-tax overearnings by 1 minus the defendants' effective tax rate. MidAmerican then calculated its base damage award by multiplying defendants' pre-tax overearnings by MidAmerican's percentage of overcharges, determined by dividing complainant's access category purchases by the total access category revenues.[44] For its claims against Pacific Bell, MidAmerican deducted the automatic refund payments made in January and February 1988.[45] MidAmerican also claims interest calculated at the maximum allowable rate of return for the monitoring period compounded daily.[46] MidAmerican contends it is entitled to interest on the damage amounts which, through July 31, 1992, totals $17,192 in the case of Pacific Bell and $395,562 in the case of USWC.[47]

20. The defendants challenge MidAmerican's damages claims on a number of grounds, raising several arguments that were previously considered and rejected by the Commission in the *MCI Liability Order* and the *MCI Damages Order*. Defendants contend that by simply basing its damages claims on a calculation of MidAmerican's prorated share of category-level overearnings, MidAmerican asks the Commission to award it damages in the same amounts it would have received under the automatic refund rule invalidated by the court in *AT&T v. FCC*.[48] The defendants maintain that such a result is expressly precluded by *AT&T v. FCC*. The defendants add that the decision in *Ohio Bell* precludes an award of damages based solely on category level overearnings.

21. Defendants next contend that, even if *AT&T v. FCC* and *Ohio Bell* do not preclude MidAmerican's damages claims, the claims still fail because MidAmerican's complaints do not establish a valid cause of action. According to defendants, to pursue a damages claim, MidAmerican must first show that the defendants charged unjust and unreasonable rates for interstate access services during the period in question, not that defendants' rates produced excessive returns in individual service

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[38] *Id.* at 226.
[39] *Discovery Order*, 7 FCC Rcd at 3582.
[40] *Id.*
[41] *Id.*
[42] The latter amount includes $285,356 from NWB and $75,759 from MTN.
[43] *See* MidAmerican/Pacific Bell Br. at 30-31. According to MidAmerican, all of the data are included in the record of these proceedings.
[44] *Id.* at 31-32.
[45] *Id.* at 32.
[46] *Id.* at 33.
[47] This amount includes $312,545 from NWB and $83,017 from MTN.
[48] *See, e.g.*, USWC Br. at 4-6. In addition, defendants contend

categories.[49] Moreover, defendants argue, Section 206 of the Act[50] requires MidAmerican to prove injury, causation, and the amount of damages in addition to establishing a violation of the Act.[51] Defendants maintain that by simply referencing defendants' earned rates of return for individual access service categories, MidAmerican has not only failed to allege any facts that would establish that defendants' rates were unjust and unreasonable during the period in question but has also failed to show that it sustained actual damage as a result of those rates.[52]

22. The defendants each raise distinct arguments to support their claims that an award of damages to MidAmerican based on carrier overearnings is inappropriate for equitable and policy reasons. USWC vigorously argues that MidAmerican is actually seeking restitution or a refund of tariffed charges, not damages. USWC argues that regardless of how MidAmerican characterizes the relief it seeks, any form of refund or restitution to MidAmerican would be contrary to the public interest.[53] USWC further contends that an award of damages would be inequitable because (i) USWC's total corporate rate of return would be driven below the confiscatory level; (ii) there was uncertainty surrounding the tariff filings during the relevant period; and (iii) MidAmerican would receive a windfall that would be inconsistent with sound equitable principles.[54]

23. For its part, Pacific Bell argues that MidAmerican's claim for damages is flawed because MidAmerican simply assumes that lower rates would have produced lower earnings and offers no probative evidence to show what a reasonable rate would have been or to otherwise support its damages claims.[55] Pacific Bell argues, as does USWC, that MidAmerican would receive a windfall if it has passed the "overcharges" on to its customers and is now awarded damages.[56] Pacific Bell argues that had its access charges to MidAmerican been lower in 1985-1986, it is almost certain that MidAmerican's rates to its customers would have been lower.[57] Pacific Bell cautions the Commission to look at the "backdrop of the practical consequences" and ensure that any decision granting MidAmerican "refunds" is equitable under the circumstances.[58] Pacific Bell further argues that, should the Commission award damages to MidAmerican, the Commission should order MidAmerican to pass the damages through to its end users in the form of a rate reduction.[59]

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that *Ohio Bell* makes clear that it was the end result of the automatic refund mechanism, not the mechanism itself, that was unlawful. Pacific Bell Br. at 7.

[49] USWC argues that MidAmerican must specify an identifiable rate that MidAmerican paid that was too high or too low. USWC Br. at 11. In addition, USWC cites to a 1970 circuit court decision to support its claim that where retroactive relief is ordered for rates paid pursuant to a tariff that is subsequently found unjust and unreasonable, the Commission must determine what a just and reasonable rate is. *Id.*, citing to *Middlewest Motor Freight Bureau v. United States*, 433 F.2d 212, 232 (8th Cir. 1970) (*Middlewest*), *cert. denied*, 402 U.S. 999 (1971). As we determined in the *MCI Damages Order*, USWC's reliance on *Middlewest* is misplaced. *MCI Damages Order* at n.56.

[50] 47 U.S.C. § 206.

[51] *See, e.g.*, Pacific Bell Br. at 17.

[52] *See, e.g.*, Pacific Bell Br. at 17-18; USWC Br. at 12. USWC contends that the principle that MidAmerican must still prove it was damaged and in what amount was established by the Supreme Court in *Southern Ry. Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 454-55 (1979) (*Seaboard*), in construing relevant sections of the ICA. The Court stated:

> [O]ur sole concern is the Commission's decision not to investigate under § 15(8)(a) [204], a decision that has only two final consequences. First, the burden of proof with regard to *reasonableness* is placed on the shipper under § 13(1) [208] rather than on the carrier, who would have borne it in a § 15(8)(a) [204] proceeding. (With respect to all other aspects of lawfulness, however, the burden is borne by the shipper in both proceedings.) Second, the shipper's relief, if unlawfulness is proved, is limited under § 13(1) [208] to actual damages rather than the full refund of overcharges available under § 15(8)(a) [204].

USWC states that this ruling has been found applicable to proceedings under the Communications Act. *See Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221, 1235 n.35 (D.C. Cir. 1980) (*ARINC*), *cert. denied*, 451 U.S. 920 (1981). Here too, as we determined in the *MCI Damages Order*, USWC's reliance on case precedent is misplaced. *MCI Damages Order* at n.59.

[53] USWC Br. at 13-19. USWC argues MidAmerican must plead its case in equity and the Commission may only award a refund/damages if we find that the public interest will be served by a refund/damages award to MidAmerican. USWC contends that the leading case in this area is *Moss v. Civil Aeronautics Board*, 521 F.2d 298 (D.C. Cir. 1975) (*Moss*), *cert. denied sub nom. Roberts v. Civil Aeronautics Board*, 424 U.S. 966 (1976), *reh'g denied*, 425 U.S. 966 (1976). USWC states that the refund in *Moss* "was governed by the equitable principles governing the law of restitution." USWC Br. at 14, citing to *Moss*, 521 F.2d at 304. We addressed this argument in the *MCI Damages Order* and found USWC's reliance on *Moss* to be misplaced. *MCI Damages Order* at n.60.

[54] USWC Br. at 17-19.

[55] Pacific Bell Br. at 17-18.

[56] *See, e.g.*, Pacific Bell Br. at 18-19.

[57] Pacific Bell Br. at 19-20. Pacific Bell cites to numerous newspaper and magazine articles to support this contention.

[58] *Id.* at 20 citing to *Las Cruces TV Cable v. FCC*, 645 F.2d 1041 (D.C. Cir. 1981) (*Las Cruces*) . In *Las Cruces*, the court upheld, in part, and remanded, in part, a Commission decision requiring refunds under Section 204 of the Act. The court noted that *Las Cruces*

> is the first time that the Federal Communications Commission has attempted to articulate standards governing its award of refunds to customers of a communications common carrier under Section 204 of the Act.

645 F.2d at 1046. Pacific Bell's reliance on *Las Cruces* is unavailing, however, because equitable considerations that may impact a Section 204 investigation are not applicable in individual Section 208 complaint proceedings.

[59] Pacific Bell Br. at 21.

24. Finally, Pacific Bell argues that any award of damages to MidAmerican based on overearnings should be reduced by Pacific Bell's underearnings in the common line category (earnings under 12.75%) and an automatic refund in the switched traffic sensitive category which Pacific Bell claims it made in 1988 prior to the court's decision invalidating the automatic refund rule.[60] Taking these factors into consideration, Pacific Bell claims that MidAmerican has already received a windfall of approximately twelve thousand dollars from undercharges and amounts already refunded.

25. MidAmerican counters that defendants' threshold arguments regarding the effect of the court's ruling in *AT&T v. FCC* have largely been rejected or precluded by the *MCI Liability Order*.[61] MidAmerican states that defendants' arguments that it has failed to allege and prove violations of the Act and actual damage are unfounded because it has made a sufficient showing of each under traditional principles governing its statutory right to such relief. According to MidAmerican, the only injury and causation it need show are the injury and causation arising from its payment of excessive rates for services it purchased from defendants during the relevant period. MidAmerican maintains that it has shown that defendants charged it rates that produced earnings in excess of the Commission's prescribed rate of return and argues that its damages are the excessive charges that MidAmerican paid.[62]

26. MidAmerican also contends that any similarities between its damages requests and the automatic refund do not transform the private complaint remedy into a public enforcement refund remedy as alleged by the defendants. MidAmerican argues that the statutory complaint remedy preceded the automatic refund rule and thus survives the invalidation of that rule.[63]

27. MidAmerican next argues that defendants' offset arguments should be rejected because the Commission cannot retroactively repeal the category rate of return prescription. Such a repeal would, according to MidAmerican, defeat the key purpose of the rate of return prescription, that is, protecting ratepayers from discriminatory and anticompetitive LEC conduct. MidAmerican does agree, however, that Pacific Bell should be given credit for its claimed partial refund of excess switched traffic sensitive charges in 1988.[64]

28. Finally, MidAmerican argues that unlike Section 204 of the Act which grants the Commission discretionary authority to weigh equitable considerations, Section 206 of the Act imposes upon the Commission an absolute duty to award full damages and defendants' offsets arguments should therefore be rejected. MidAmerican contends that, even if taken into account, any equitable considerations weigh in its favor rather than in the favor of the defendants.[65] According to MidAmerican, by establishing a rate of return prescription that balanced shareholder and ratepayer interests, the Commission did all that was necessary in "balancing the equities."[66]

b. Discussion

29. *AT&T v. FCC and Ohio Bell:* The defendants' claims that the holdings in *AT&T v. FCC* and *Ohio Bell* control these proceedings and bar an award of damages to MidAmerican are without merit for the reasons stated in both the *MCI Liability Order* and the *MCI Damages Order*. In the liability section above, we again emphasized that the court in *AT&T v. FCC* explicitly acknowledged the Commission's authority to order a carrier to disgorge earnings in excess of a rate of return prescription,[67] finding only the remedy component of the Commission's rate of return prescription (the automatic refund mechanism) to be unlawful.[68] More to the point, we emphasized that "the [*AT&T v. FCC*] opinion does not address Section 208 complaint proceedings nor purport to alter the statutory scheme of the Act or the remedies Congress established therein."[69] Similarly, as we stated in the *MCI Damages Order*, the *Ohio Bell* decision does not expand upon *AT&T v. FCC* and does not address the Commission's authority to award damages in private complaint actions under Section 208 of the Act.[70]

30. *Section 201(b) of the Act:* We turn now to the defendants' contention that MidAmerican's damages claims must be dismissed because MidAmerican has failed to prove defendants' rates were unjust and unreasonable within the meaning of Section 201(b) of the Act. In the liability section above, we held that the complainant met its burden of proof by establishing that the defendants violated our rate of return prescription.[71] Accordingly, the question before us now is not whether defendants' rates were unjust and unreasonable; rather the questions now are whether the complainant suffered any measurable damage as a consequence of paying rates previously determined by the Commission to be unlawful under Section 201(b).

31. The defendants next claim--that even if MidAmerican has sustained its burden and shown that defendants' rates were unjust and unreasonable, its damages claims must still fail because judicial precedent compels MidAmerican to establish what a just and reasonable rate would have been as a prerequisite to pursuing damages claims based on

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[60] *Id.* at 21-22.

[61] MidAmerican/USWC RBr. at 3-6.

[62] MidAmerican/Pacific Bell RBr. at 7-8.

[63] *Id.* at 9-12. In addition, MidAmerican points out the damages to which it is entitled under Section 208 are compensation for actual loss as opposed to a share of a carrier's "restitution" of the carrier's unjust enrichment which would have been the case under the automatic refund rule. MidAmerican also contends that it would have been eligible for its share of the carrier's restitution under the automatic refund rule even if it were not a customer of the carrier during the monitoring period when rates were excessive. *Id.* at 10-12.

[64] *See* MidAmerican/Pacific Bell Br. at 32.

[65] *See* MidAmerican/USWC RBr. at 13-14.

[66] *Id.* at 16.

[67] *AT&T v. FCC*, 836 F.2d at 1392 ("Thus, as we previously have concluded, the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate of return prescription.").

[68] Indeed, the court in *Ohio Bell* recognized the continuing efficacy of our rate of return framework. *See* 949 F.2d at 868.

[69] *MCI Liability Order*, 5 FCC Rcd at 223.

[70] *MCI Damages Order* at para. 26.

[71] In the *MCI Liability Order*, we held that the complainant therein could prove that defendants' rates were unjust and unreasonable by proving that the defendants violated our rate of return prescription. *See MCI Liability Order*, 5 FCC Rcd at 226.

unreasonable rates[72] --has previously been discussed and rejected by the Commission. In the *MCI Damages Order* we reemphasized[73] the Commission's authority to prescribe and enforce carriers' rates of return, pointed out that the issue in these proceedings is not whether individual rates are unlawful, but whether cumulative rates that produced earnings over and above a prescribed rate of return are unjust and unreasonable, and agreed with the Bureau's determination in the *Discovery Order* that a proper starting point for assessing damages based on violations of a rate of return prescription is to look at the difference between the amount complainant paid for defendants' interstate access services and the amount it would have paid if defendants had charged rates that produced returns within the Commission's prescribed levels.[74] We said, "[i]t is appropriate and consistent with the Commission's rate of return regulatory scheme to inquire as to earnings in excess of prescribed levels for purposes of assessing damages claims."[75] MidAmerican has shown that it purchased services from defendants at rates that produced earnings over and above the defendants' prescribed levels. We previously determined in the *MCI Liability Order* that a violation of such a prescription constitutes a violation of the Act for which damages may lie.

32. *Damages and Offsets:* The defendants' arguments are devoted primarily to attempting to persuade the Commission that MidAmerican's damages claims are really claims for restitution or refunds governed by equitable or public policy considerations. These considerations, according to defendants, militate against any award of damages to MidAmerican based on excessive earnings. The defendants argue, in effect, that the damages MidAmerican seeks are equivalent to refunds that would have been required under the refund mechanism invalidated by the court in *AT&T v. FCC*. We do not agree. We are concerned here with determining whether a particular customer, which has availed itself of a statutory complaint remedy under Title II of the Act, has sustained any measurable damage that can be traced to defendants' violations of the Act. Although a damages award under Section 208 of the Act might well be equal or substantially similar to a refund ordered under Section 204 of the Act,[76] this does not transform a private complaint action into a public enforcement proceeding subject to broad public interest considerations.

33. As in the *MCI Damages Order*, we find defendants' arguments with respect to "passing-on" equally unavailing. In rejecting this same argument, we said, "[w]hether [complainant] passed on the overcharges or absorbed them does not alter the fact that the defendants overcharged [complainant] in violation of a binding rate of return prescription and must answer for such violations.[77] The issue is not what MidAmerican has done in response to paying excessive rates, but whether MidAmerican has been damaged as a result of these excessive rates.[78]

34. Nor can we accept the defendants' related claim that we should require MidAmerican to flow through any damages it may receive to its end user customers. Sections 206-209 of the Act give private parties the right to file complaints challenging the acts or omissions of carriers and to recover monetary damages resulting from such acts or omissions. Complainants, however, are charged, as MidAmerican is in the instant case, with the burden of establishing violations of the Act or Commission rule or order and the amount or extent of damage suffered as a consequence of such violations. Accepting defendants' flow through argument would, in effect, transform MidAmerican's complaints into class action suits on behalf of its customers, a result neither expressly contemplated by nor consistent with the private remedy created under Sections 206-209 of the Act.

35. In addition, we reject USWC's contention that a damages award to MidAmerican is precluded because it would drive USWC's overall rate of return for USWC in the aggregate below the minimum necessary to raise capital to confiscatory levels. Assuming *arguendo*, that such an inquiry is relevant to a Section 208 damages claim, USWC has failed to provide sufficient record evidence for the Commission to assess the impact of any damages award upon its overall interstate rate of return. While USWC has provided some data in Exhibit A to its brief,[79] these data made no clear showing of the amount by which an award to MidAmerican would reduce USWC's overall interstate earnings or rate of return let alone that any such reduction would be confiscatory. For the reasons stated in the *MCI Damages Order*,[80] we find USWC's other equitable arguments regarding the uncertainty surrounding tariff filings during the 1985-86 period and an alleged windfall to MidAmerican should it receive restitution equally unavailing.

36. We also reject MidAmerican's claim that the allowance of offsets would somehow repeal our rate return prescription on a category basis and be contrary to issues of equity. The issue of damages to a particular complainant is separate and apart from the validity and effect of our rate

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[72] USWC Br. at 10, citing *Middlewest*, 433 F.2d 212, 232.

[73] For a full discussion of the Commission's authority to prescribe and enforce carriers' rates of return, *see MCI Liability Order*, 5 FCC Rcd at 222-23.

[74] *MCI Damages Order* at para. 29.

[75] *Id.*

[76] *See Seaboard*, 442 U.S. 444, 455, n.8:

> If a shipper proves a rate is unreasonable and that he was damaged in the full amount he was overcharged, the outcome of a § 13(1) [§ 208] proceeding will be no different than that of a § 15(8)(a) [§ 204] proceeding in which the carrier fails to establish the reasonableness of the rate.

[77] *MCI Damages Order* at para. 31.

[78] While defendants have asserted that lower charges to complainant would have resulted in lower charges to complainant's customers, they have provided no persuasive evidence in support of this contention. Pacific Bell, for example, relies solely on press clippings that purportedly show that MidAmerican's rates to its customers would have been affected by changes in defendants' rates. Pacific Bell Br. at 19-20. These clippings do not, however, establish, as a matter of law, that complainant, in fact, passed on defendants' overcharges to its customers.

[79] Exhibit A contains a summary and compilation of information submitted in MTN's and NWB's Forms 492 for the relevant monitoring period, a calculation of how much money USWC would have earned if its entire carrier enterprise earned exactly at a 12.75% rate of return, and the same calculation at a 13.10% rate of return.

[80] *MCI Damages Order* at para. 32.

of return prescription. The determination we make here is the extent to which complainant suffered damage on account of defendants' violations of the rate of return prescription. The question of offsets is relevant to that determination and no other.

37. Pacific Bell raises factors which it believes warrant an offset against MidAmerican's damages claims. Pacific Bell states that it underearned on its common line services during the period in question and that MidAmerican's prorated share of those underearnings is approximately $9,000. Pacific Bell argues that taking into account its underearnings, a net overcharge to MidAmerican of approximately $5,000, based on the measure of damages advocated by MidAmerican, results.[81]

38. USWC also provides specific calculations for offsets and raises factors it believes should reduce MidAmerican's damages claim. USWC states that MidAmerican's base damage awards should be reduced by approximately $20,000 from MTN and $17,000 from NWB to take into account underearnings from Colorado and South Dakota.[82] In addition, both MTN and NWB contend that MidAmerican's overearnings are overstated because MidAmerican improperly used 13.10% to calculate category overearnings in states which also had overall earnings in excess of the Commission's prescribed rate of return. MTN also contends that MidAmerican's claim is overstated because several items were excluded from MTN's rate base when filed on MTN's Form 492.[83] Finally, USWC contends that MidAmerican's claim against NWB should be amended because the tax rates USWC submitted for NWB were marginal rather than effective tax rates.[84]

39. We have carefully reviewed the arguments and evidence presented by the parties and believe that some offset to the claimed damages amounts is appropriate. In the *MCI Liability Order*, we specifically rejected claims by the defendants that the Commission is required to take a carrier's interstate access underearnings as well as overearnings into account in determining whether a violation of the Act has occurred because this would be at odds with established case law.[85] However, we stated in the *MCI Damages Order* that it is appropriate to consider defendants' underearnings in assessing complainant's damage or injury resulting from defendant's overearnings in a particular monitoring period[86] and rejected the complainant's contention that this approach results in unlawful cross-subsidization.[87] The parties have made no argument which persuades us to alter our holdings.

40. Based upon our decision regarding the computation of damages here, we award damages to MidAmerican from Pacific Bell in the amount of $4,866.[88] In reaching this amount, we have adjusted MidAmerican's calculation of Pacific Bell's overearnings at a category target plus buffer rate of 13.25% rather than the overall target plus buffer rate of 13.10% in the switched traffic sensitive category.[89] We have also allowed the offset of undercharges in the common line category in the amount of $8,685[90] and agree with the parties that it is appropriate to deduct the $3,000 refunded by Pacific Bell in 1988.

41. We award damages to MidAmerican from MTN in the amount of $72,523. In reaching this amount, we have adjusted MidAmerican's calculation of MTN's overearnings in New Mexico at the category target plus buffer rate of 13.25% rather than the overall target plus buffer rate of 13.10% in the switched traffic sensitive category.[91] We are not allowing MTN an offset for underearnings in Colorado because MTN recalculated its rate of return in the switched traffic sensitive category using disallowed items[92] and then calculated its offset using the target plus buffer rate of

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[81] We note that MidAmerican contends that Pacific Bell should pay damages in the amount of $15,696 after deleting the $3,000 refunded to MidAmerican in 1988. Pacific Bell contends that the amount in question is approximately $14,000 before offsets and after deducting the $3,000 refund. The difference of $1,696 appears to be primarily the result of MidAmerican using 13.10% as the rate of return for measuring category overearnings when the defendant's overall rate of return exceeded the Commission's prescribed amount. There is no basis for MidAmerican's assertion, and we will recalculate Pacific Bell's base damage amount using 13.25%. *See infra* note 89.

[82] Colorado underearned in the switched traffic sensitive category and South Dakota underearned in both the switched traffic sensitive and special access categories.

[83] In addition, USWC argues that in calculating its damages claim, MidAmerican ignored the fact that MTN's and NWB's reported rates of return were not accurate because the Commission's rate base formula disallows "significant amounts of prudently invested carrier capital." USWC RBr. at 4.

[84] We note that MidAmerican agrees that the effective tax rate is the proper rate to use in "grossing up" NWB's overearnings. *See* MidAmerican/NWB Br. at 30.

[85] *MCI Liability Order*, 5 FCC Rcd at 223, citing *Nader v. FCC*, 520 F.2d 182, 201 (D.C. Cir. 1975). *See also New England Telephone and Telegraph Co. v. FCC*, 826 F.2d 1101 (D.C. Cir. 1987), *cert denied*, 109 S.Ct. 1942 (1989); and *AT&T v. FCC*.

[86] *MCI Damages Order* at para. 38.

[87] *Id.* at para. 39.

[88] This amount is calculated as follows:

$ 16,551 (overcharges)

- 8,685 (undercharges - common line category)

- 3,000 (amount refunded by Pacific Bell)

$ 4,866 Damages

[89] We note that 13.25% is the target rate of return plus buffer for category earnings and 13.10% is the target rate of return plus buffer for overall earnings. Therefore, the overall target plus buffer rate of 13.10% is inapplicable to category earnings.

[90] To be consistent with MidAmerican's figures, we did the complete calculations to arrive at the underearnings rather than use the figure provided by Pacific Bell that had been rounded off to the closest thousand.

[91] As we noted above, the 13.10% overall target plus buffer rate of return is inapplicable to category earnings. *See supra* note 89.

[92] We reject MTN's argument that Information and Intercept elements should be included in the calculation of MTN's rate of return for the switched traffic sensitive category. These items were not included by state on MTN's Form 492 and we will not allow adjustments to be made to those reported figures. As we discussed in the *MCI Liability Order*, the Form 492 is a final report and carriers may rely upon it. *MCI Liability Order*, 5 FCC Rcd at 225, para. 78. We also reject USWC's contention that the Commission's rate base formula disallows items that should be included, thus overstating USWC's actual rate of return. USWC's argument is an impermissible collateral attack on a prior Commission decision. *See* Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, Decision on

13.25% rather than the 12.75% target rate. When these errors are corrected, MTN did not underearn in Colorado.[93]

42. We award damages to MidAmerican from NWB in the amount of $188,553.[94] In reaching this amount, we have adjusted MidAmerican's calculation of NWB's overearnings by state at the category target plus buffer rate of 13.25% rather than the overall target plus buffer rate of 13.10% in the special access and switched traffic sensitive categories.[95] We also agree with the parties that the effective rather than the marginal tax rate should be used and have recalculated MidAmerican's damages using that rate provided by NWB. In addition, we allowed NWB an offset of $13,397 for underearnings in South Dakota.[96]

2. Interest on Damages Awards

a. Contentions of the Parties

43. Defendants' final claim is that MidAmerican is not entitled to prejudgment interest should the Commission award damages to MidAmerican. Pacific Bell grounds its claim on its contention that the amount of damages has been sharply disputed in these proceedings.[97] Pacific Bell claims that interest would penalize it even though it has not been accused of deliberate wrongdoing and interest is not necessary to make MidAmerican whole. USWC simply contends that while the Commission may award interest under Section 204 of the Act, there is no provision for the award of interest under Section 206 of the Act. Because we cannot lawfully grant MidAmerican a refund, USWC argues, we may not award interest.[98]

44. MidAmerican disputes defendants' claims that it is not entitled to prejudgment interest in connection with any ultimate damages award. MidAmerican contends that an award of prejudgment interest is appropriate in the instant case because defendants could ascertain with sufficient certainly the amount of MidAmerican's damages. MidAmerican also argues that an award of interest is required to effectuate the purposes of the Commission's complaint remedy.[99] MidAmerican contends it is entitled to interest at the maximum allowable rate of return from January 1, 1987 through July 31, 1992 of $17,192 from Pacific Bell and $395,562 from USWC.[100]

b. Discussion

45. USWC's claim that the Commission lacks the requisite authority to award interest in a Section 208 common carrier complaint proceeding has no merit. Although an award of interest does not fall squarely within the ambit of Section 208 of the Communications Act, our authority under Sections 4(i) and other sections of the Act to award interest in a common carrier complaint case is well established.[101] In deciding whether to award interest in a particular common carrier complaint case we are generally guided by federal court practice, where the award of prejudgment interest "... is a matter left to the sound discretion of the trial court."[102] The award of interest in a common carrier complaint case is thus guided by considerations of fairness. Applying this standard, we are persuaded that an award of interest is appropriate in this case. MidAmerican was effectively deprived of the use of the excessive amounts it paid to defendants as a result of defendants' unlawful rates while the defendants, on the other hand, enjoyed the beneficial use for a substantial period of time of funds to which MidAmerican rightfully has a claim. We are persuaded that interest is required not only to effect a full and fair remedy for MidAmerican, which paid rates higher than it would have paid had defendant earned within the prescribed level, but also to avoid any unjust enrichment of defendant stemming from its charging rates that we have determined to be unjust and unreasonable under Section 201(b) of the Act.[103] Therefore, we award complainant interest computed at the IRS rate for tax refunds.[104] In addition, we find that interest should

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Remand, CC Docket No. 86-497, 7 FCC Rcd 296 (1991), *appeal docketed sub nom. Illinois Bell Telephone Co., et al. v. FCC*, No. 90-1020 (D.C. Cir. Jan.11, 1991).

[93] MTN earned $38,996,000 in the switched traffic sensitive category in Colorado. Using the target category rate of return of 12.75%, MTN was allowed earnings of $37,701,113. MTN cannot be said to have underearned in the switched traffic sensitive category to the extent that its earnings exceeded the target earnings level. *See infra* note 97.

[94] This amount is calculated as follows:

$ 201,950 (overcharges)

\- 9,102 (undercharges - special access category)

\- 4,295 (undercharges - switched traffic category)

$ 188,553 Damages

[95] As we noted above, the 13.10% overall target plus buffer rate of return is inapplicable to category earnings. *See supra* note 89.

[96] We note that USWC calculated offsets for category underearnings at 13.25%. USWC should have used the authorized target rate of 12.75%. A carrier cannot be said to have underearned to the extent its earnings exceeded the target category rate of return. Therefore, USWC's offset calculations are in error to the extent it calculated underearnings in particular categories using the category target rate of return plus buffer. We recalculated NWB's offsets to allow only for underearnings below 12.75%.

[97] *See, e.g.*, Pacific Bell Br. at 24.

[98] USWC Br. at 13.

[99] *See* MidAmerican/MTN Br. at 24-28.

[100] *Id.* at 32-33.

[101] *See* MCI Telecommunications Corporation v. American Telephone and Telegraph Company, *et al.*, 94 FCC 2d 332, 343-46 (1983).

[102] *United States v. California Board of Equalization*, 650 F.2d 1127, 1132 (9th Cir. 1981), *aff'd*, 456 U.S. 901 (1982), *reh'g denied*, 456 U.S. 985 (1982).

[103] *See New England Telephone and Telegraph Co. v. FCC*, 826 F.2d 1101, 1113 (D.C. Cir. 1987), *cert. denied*, 109 S. Ct. 1942 (1989) (carriers may reasonably be required "to pay full interest for earnings they had no right to retain in the first place.").

[104] The applicable IRS interest rates are set forth in Appendix A. We believe that the rationale adopted by the Commission for applying the IRS rate in pole attachment complaint proceedings under Section 204 of the Act, 47 U.S.C. § 204, is equally applicable here. In Teleprompter of Fairmont v. C&P of West Virginia, 79 FCC 2d 232 (1980), the Commission stated

> As a matter of fairness, we believe that the rate of interest applied in a pole attachment complaint proceeding should be readily available, easily applied, and periodically revised to reflect changes in borrowing costs. In light of these considerations, we find the interest rate for federal tax refunds and additional tax payments

begin to accrue from January 1, 1987, the day after which the 1985-1986 monitoring period ended. At that point, defendants were subject to the earnings limitations of a new monitoring period. Accordingly, we award interest calculated at the IRS rate for tax refunds from Pacific Bell Telephone Company, Mountain States Telephone and Telegraph Company, and Northwestern Bell Telephone Company to MidAmerican from January 1, 1987 until the date of full payment to MidAmerican.

IV. CONCLUSION

46. We have carefully reviewed the extensive record before us and have found, to the extent indicated here, that complainant is entitled to an award of damages, plus accumulated interest on such damages, for Pacific Bell Telephone Company's, Mountain States Telephone and Telegraph Company's, and Northwestern Bell Telephone Company's violations of our rate of return prescription for the 1985-1986 monitoring period.

V. ORDERING CLAUSES

47. Accordingly, IT IS ORDERED pursuant to Section 4(i), 4(j), 201, 206, 207, 208 and 209 of the Communications Act, as amended, 47 U.S.C. §§ 4(i), 4(j), 201, 206, 207, 208 and 209, that the above-captioned complaints filed by MidAmerican Long Distance Company ARE GRANTED to the extent discussed here.

48. IT IS FURTHER ORDERED that Pacific Bell Telephone Company SHALL PAY to MidAmerican Long Distance Company the sum of $4,866 (four thousand eight hundred sixty-six dollars) within 60 days after the release date of this Memorandum Opinion and Order; that Mountain States Telephone and Telegraph Company SHALL PAY to MidAmerican Long Distance Company the sum of $72,523 (seventy-two thousand five hundred twenty-three dollars) within 60 days after the release date of this Memorandum Opinion and Order; and that Northwestern Bell Telephone Company SHALL PAY to MidAmerican Long Distance Company the sum of $188,553 (one hundred eighty-eight thousand five hundred and fifty-three dollars) within 60 days after the release date of this Memorandum Opinion and Order.

49. IT IS FURTHER ORDERED that Pacific Bell Telephone Company, (Mountain States Telephone and Telegraph Company, and Northwestern Bell Telephone Company SHALL PAY to MidAmerican Long Distance Company interest on the damages awarded here computed at the relevant IRS rates set forth in Appendix A beginning January 1, 1989 until the date full payment is made.

50. IT IS FURTHER ORDERED that the Motion To Accept Late-Filed Pleading filed by MidAmerican Long Distance Company on December 7, 1989 IS GRANTED.

51. IT IS FURTHER ORDERED that the Supplement to Motion to Dismiss filed by The Mountain States Telephone and Telegraph Company and Northwestern Bell Telephone Company on February 14, 1992 IS ACCEPTED for filing.

52. IT IS FURTHER ORDERED that the Motion for Leave to File Supplemental Damages Calculation filed by MidAmerican Long Distance Company on October 21, 1992 IS GRANTED.

53. IT IS FURTHER ORDERED that the Application for Review filed on March 7, 1991 by MidAmerican Long Distance Company IS DISMISSED as moot.

54. IT IS FURTHER ORDERED that the Joint Motion to Dismiss filed by The Mountain States Telephone and Telegraph Company and Northwestern Bell Telephone Company on November 22, 1989 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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suitable for use in this type of proceeding. This rate appears in a variety of easily obtained official and commercial publications, and is revised on a regular basis. [Footnote omitted.]

79 FCC 2d at 238.

APPENDIX A

Effective Period	Rate	Internal Revenue Service Citation
01/01/87 - 03/31/87	8%	Rev.Rul. 146, 1986-2 C.B. 208
04/01/87 - 06/30/87	8%	Rev.Rul. 87-23, 1987-13 I.R.B. 46
07/01/87 - 09/30/87	8%	Rev.Rul. 87-62, 1987-29 I.R.B. 10
10/01/87 - 12/31/87	9%	Rev.Rul. 87-87, 1987-36 I.R.B. 8
01/01/88 - 03/31/88	10%	Rev.Rul. 87-131, 1987-50 I.R.B. 6
04/01/88 - 06/30/88	9%	Rev.Rul. 88-17, 1988-10 I.R.B. 6
07/01/88 - 09/30/88	9%	Rev.Rul. 88-50, 1988-25 I.R.B. 39
10/01/88 - 12/31/88	10%	Rev.Rul. 88-86, 1988-41 I.R.B. 1
01/01/89 - 03/31/89	10%	Rev.Rul. 88-105, 1988-51 I.R.B. 4
04/01/89 - 06/30/89	11%	Rev.Rul. 89-36, 1989-1 C.B. 309
07/01/89 - 09/30/89	11%	Rev.Rul. 89-69, 1989-1 C.B. 310
10/01/89 - 12/31/89	10%	Rev.Rul. 89-99, 1989-2 C.B. 256
01/01/90 - 03/31/90	10%	Rev.Rul. 89-125, 1989-2 C.B. 257
04/01/90 - 06/30/90	10%	Rev.Rul. 90-19, 1990-1 C.B. 186
07/01/90 - 09/30/90	10%	Rev.Rul. 90-47, 1990-1 C.B. 187
10/01/90 - 12/31/90	10%	Rev.Rul. 90-71, 1990-35 I.R.B. 4
01/01/91 - 03/31/91	10%	Rev.Rul. 90-94, 1990-46 I.R.B. 16
04/01/91 - 06/30/91	9%	Rev.Rul. 91-20, 1991-11 I.R.B. 1
07/01/91 - 09/30/91	9%	Rev.Rul. 91-33, 1991-21 I.R.B. 1
10/01/91 - 12/31/91	9%	Rev.Rul. 91-50, 1991-37 I.R.B. 1
01/01/92 - 03/31/92	8%	Rev.Rul. 91-65, 1991-51 I.R.B. 1
04/01/92 - 06/30/92	7%	Rev.Rul. 92-21, 1992-14 I.R.B. 14
07/01/92 - 09/30/92	7%	Rev.Rul. 92-44, 1992-24 I.R.B. 86
10/01/92 - 12/31/92	6%	Rev.Rul. 92-77, 1992-38 I.R.B. 12

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-111

In re Applications of

DEAS COMMUNICATIONS, INC. File No. BPH-910208MB

HEALDSBURG EMPIRE CORPORATION File No. BPH-910212MM

For Construction Permit for a
New FM Station on Channel 240A
in Healdsburg, California

APPEARANCES

F. Joseph Brinig and *Lawrence Bernstein* on behalf of Deas Communications, Inc.; *Jerome S. Silber* and *Jerome S. Boros* on behalf of Healdsburg Empire Corporation; and *Larry Miller* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE WALTER C. MILLER

Issued: February 17, 1993; Released: February 25, 1993

FINDINGS OF FACT

1. Only two applicants remain in this mutually exclusive FM proceeding. Deas Communications, Inc. (Deas) and Healdsburg Empire Corporation (Empire) each seek a construction permit to operate a new FM station on Channel 240A in Healdsburg, California.

2. The Chief, Audio Services designated this case for hearing on May 20, 1992 (7 FCC Rcd 3135). At that time a third applicant, Healdsburg Broadcasting Inc. (HBI) was still actively prosecuting their application.

3. After the interlocutory cycle had run its course only one factual issue, the standard comparative issue, along with the ultimate issue, remained to be tried:

(1) To determine which of the proposals would, on a comparative basis, best serve the public interest; and

(2) To determine, in light of the evidence adduced pursuant to the specified issue, which application should be granted, if any.

4. There also appeared to be a significant difference in the size of the areas and populations which would receive service from the proposals. So, in his Hearing Designation Order (7 FCC Rcd 3135 *supra.* at para 14), the Chief also called for comparative coverage evidence.

5. On July 21, 1992, the then Trial Judge held the prehearing Conference. There he laid out the procedural deadlines, including the discovery deadlines. However, other than the HDO's standard document exchange (7 FCC Rcd 3135 *supra.* at para. 25), the parties conducted no discovery.

6. On August 13, 1992, the Presiding Judge dismissed HBI's application (see para. 2 *supra.*) for failing to comply with the Commission's engineering rules. He did so at the urging of the Mass Media Bureau (See FCC 92M-874).

7. On October 1, 1992, the Trial Judge ruled that neither Deas nor Empire had shown any need for oral testimony, and so no witnesses needed to be produced for cross examination (FCC 92M-983). Four days later he received all of Deas' and Empire's comparative exhibits into evidence, accepted an engineering stipulation on the comparative coverage question, established dates for proposed and reply findings, and closed the record (see FCC 92M-985, released October 5, 1992).

8. However, all the work described in paragraph 7 was cancelled out. For on October 24, 1992, the Review Board reversed the Trial Judge's dismissal order (See Para. 6 *supra.*), and reinstated HBI's application.

9. So the Trial Judge was forced to reopen the record, accord the parties new discovery rights, and give them another opportunity to justify an oral hearing. Again the parties conducted no discovery (see para. 5 *supra.*).

10. On December 15, 1992 (FCC 92M-1097) the Judge pointed out that there had been no discovery, and thus there was no need to entertain any requests to cross examine any witnesses. He specified January 7, 1993 as the date for filing proposed findings and January 15, 1993 for filing reply findings (Also see FCC 92M-1103), released December 28, 1992).

11. Meanwhile Deas and HBI settled their differences and reached an agreement. They agreed to merge their interests. On January 21, 1993 (FCC 93M-29), the present Trial Judge granted an unopposed "Joint Request for Approval of Agreement, Dismissal of Application and Merger of Applicants." He approved the merger between Deas and HBI, and dismissed (again) HBI's mutually exclusive application with prejudice. Under the merger HBI is now a 50% non-voting stockholder in Deas. So once more only Deas and Empire remain.

12. Both Deas and Empire filed their Proposed Findings of Fact and Conclusions of Law on February 5, 1993, and their Reply Findings on February 12, 1993.

Issue 1: The Standard Comparative Issue
Description of the Applicants

13. *Deas,* Deas, a California corporation, has both common (voting) and preferred (non-voting stock). Deas' President, Mario Edgar Deas owns all of the voting stock; i.e., 4000 shares of common voting stock. This holding represents 20% of Deas' total equity.

14. Deas' officers and directors are: Mario Edgar Deas, President and Director; Sherryll A. Peterson, Secretary and Director; and Fred Haley, Treasurer and Director.

15. The following Chart shows the ownership in Deas' non-voting stock. The non-voting stock represents 80% of Deas' total equity.

CHART

Stockholder	Stockholding and Equity Percentage
Steven E. and Jane Rosenberg Deas (community property)	1500 preferred (non-voting) shares (7.5%)
Bruce D. and Suzel Bozada-Deas (community property)	1500 preferred (non-voting) shares (7.5%)
Paul A. and Pamela Sue Deas (community property)	1500 preferred (non-voting) shares (7.5%)
Michael L. Deas	1500 preferred (non-voting) shares (7.5%)
Healdsburg Broadcasting, Inc.	10,000 preferred (non-voting) shares (50%)

16. Steven E. and Jane Rosenberg Deas are husband and wife. Bruce D. and Suzel Bozada-Deas are husband and wife. Paul A. and Pamela Sue Deas are husband and wife. Steven E., Bruce D., Paul A. and Michael L. Deas are brothers and are the sons of Mario Edgar Deas.

17. Healdsburg Broadcasting, Inc. (HBI), a California Corporation, has two classes of common stock: Class A voting stock, and Class B non-voting stock. 100% of the voting stock, 3750 shares (25% of HBI's equity) is jointly held by Michael and Julia Akana, husband and wife, as community property.

18. 66.66% of the Class B non-voting stock (50% of HBI's net equity is held by Batista Vierra. The remaining 33.33% of the Class B non-voting stock (25% of HBI's equity) is held by David Hernandez.

19. All of Deas' officers and directors live in Healdsburg, California. Deas' shareholders Steven E. and Jane Rosenberg Deas, Paul A. and Pamela Sue Deas, and Michael L. Deas also live in Healdsburg. Bruce D. and Suzel Bozada Deas live 7 miles south of Healdsburg in Windsor, California.

20. HBI principals Michael Ankana and Julia Akana and non-voting stockholder David Hernandez live in Castro Valley, California. Batista Vieira lives in San Jose.

21. *Empire.* Empire, a Delaware Corporation, has one class of stock, voting stock. It is owned by Empire Broadcast Corporation (51%), Robert S. Kieve (28%), and Joanne S. Kilmartin (21%).

22. Empire Broadcasting Corporation's (EBC's) officers and directors are: Rodney J. Diridon - Director; Robert S. Kieve - President/Director; Joanne S. Martin - Vice President/Director; Myron S. Lewis - Director; Vincent A. Lopopola - Exec. Vice President/Director; John McLeod - Vice President; John A. Palvino - Director; and Joseph Zukin - Director. Robert S. Kieve owns 51.21% of EBC's stock and Vincent A. Lopopola 10.23%.

Diversification of Mass Media

23. *Deas.* Neither Deas nor its sole voting stockholder, Mario Edgar Deas, nor any of its officers or directors holds or has ever held any ownership or other interest in any media of mass communications.

24. However, one of Deas' non-voting stockholders, Batista Vieira, holds the following broadcast interests:

(a) Vieira and his wife Dolores, operating as Ethnic Radio, own standard radio station KLBS, Los Banos, California. Batista Vieira is President and Director of Ethnic Radio;

(b) Batista and Delores Vieira jointly own 63.32% of Coyote Communications, Inc., licensee of KSQQ (FM), Morgan Hill, California. Batista Vieira is President and Director of Coyote;

(c) Batista Vieira is Vice-President/Director/Secretary-Treasurer and 100% shareholder of VLB Broadcasting Inc., licensee of KQLB(FM), Los Banos, California; and

(d) Batista Vieira holds 4000 shares of Class B common non-voting stock (all of the non-voting stock and 40% of the equity) in J.B. Broadcasting, Inc., an FM applicant for Patterson, California (BPH-920514MN). A pending settlement agreement, if approved, will result in J.B. securing the Patterson CP.

25. *Empire Corporation.* EBC (Empire's 51% owner) is the licensee of KLIV(AM), San Jose, California, and KARA(FM), Santa Clara, California. Both KLIV and KARA are within 100 air miles of Healdsburg.

26. EBC director of John A. Palvino is a 28% stockholder, officer, and director of Lincoln Group Ltd., the licensee of WHAM(AM) and WVOR(FM), Rochester, New York and WBUF(FM), Buffalo, New York.

27. EBC director Joseph Zukin owns more than 50% of Meadow Pacific Corporation; Meadow Pacific owns 100% of the stock of Kern Broadcasting, Inc., licensee of KGEO(AM), and KGFM(FM), Bakersfield, California.

Best Practicable Service
Comparative Coverage

28. Deas and Empire have stipulated "that there would not be a significant difference in the size of the areas and populations proposed by Deas and Empire which would receive FM service of 1 mV/m or greater intensity."

29. Deas and Empire have further stipulated "that all the areas which the parties propose to serve already receive five or more fulltime primary aural services."[1]

[1] Even though the Mass Media Bureau is apparently not a party to the stipulation the Trial Judge assumes that the public or segments of the public will not be disadvantaged by the Deas-Empire stipulation.

Integration

30. *Deas.* Deas claims 100% quantitative integration. They intend to integrate their sole voting stockholder, Mario Edgar Deas, into the day-to-day operation of the proposed station. Mario Deas will be the full-time General Manager.

31. As General Manager Deas will be ultimately responsible for all station policies. That includes programming, financial, sales, and personnel policies. He will hire and fire employees, and oversee the station's equal employment opportunity program, station promotions, and community outreach.

32. Mario Edgar Deas was born in Cuba and is of 100% Cuban ancestry. He became a naturalized United States citizen in 1957. He lives at 456 Hidden Acres Road, Healdsburg, California, and *has resided* in Healdsburg since 1955.

33. Deas is presently President of E and M Electric and Machinery, Inc. (E & M) in Healdsburg. E and M repairs motors, supplies electrical parts and designs specialized computers that control a machine's actions. If Deas' application is granted Mario Deas will resign as E and M's President and cease all other employment before the station begins operating.

34. Mario Deas has participated in the following *civic activities* within the proposed station's 1 mV/m contour.

(a) *Healdsburg Chamber of Commerce:* Member (1970 to the present); President (1976); Russian River Wine Festival Chairman (1978); Board Member (1975 to 1978); Member, Business Development Council (1989 to the present);

(b) *Healdsburg Kiwanis Club:* Member (1979 to present); President (1981); Chairman of Sonoma County Wine Auction (1983); Board Member (1980 to 1982, 1988-89);

(c) *Healdsburg High School Booster Club:* Member (1977 to the present); President (1979-1980); Board Member (1978-1981);

(d) *Healdsburg Planning Commission:* Member (1980);

(e) *Healdsburg Museum - Historical Society:* Charter member (1977 to present);

(f) *Federated Church of Healdsburg:* Member (1960 to the present); Member, Advisory Committee for Building Sanctuary (1988-1989).

(g) *Healdsburg City Council:* Councilperson (1988 to the present); Vice Mayor (1990-1991); Member of Sonoma County Transportation Committee and Finance Committee (1989-1990); Member, Migrant Worker Task Force Committee (1990-1991);

(h) *Geysersville Chamber of Commerce:* Member (1991 to the present).

35. Since he is an Hispanic American, Mario Edgar Deas claims and will be credited with minority enhancement.

36. *Empire.* Empire claims it will fully integrate 21% stockholder, Joanne S. Kilmartin into its proposed day-to-day operation. Ms. Kilmartin would serve (at least 40 hours a week) as General Manager of Empire's station.

37. As General Manager, she will generally supervise and hold ultimate authority over all aspects of Station Management and operation. She will oversee construction and regulatory compliance; she will hire and supervise the staff; and she will deal with advertisers and their representatives.

38. Ms. Kilmartin will develop and implement the station's programming format; she'll hire the station's counsel, accountants and consulting engineers. She will fix the operating budget, coordinate banking arrangements and administer the day-to-day operation. Ms. Kilmartin will coordinate the proposed station's involvement with community organizations and charitable causes. She will direct the broadcast of public service announcements and coordinate station access to members of the public.

39. Joanne S. Kilmartin was born in Healdsburg in 1949. From 1949 until 1971 and from 1972 to 1973, she lived in Cloverdale, California (within Empire's proposed service area). From 1971 to 1972 she lived in Santa Rosa, California. That is also within Empire's proposed service area.

40. Ms. Kilmartin has some *broadcast experience.* From 1975 to 1982 she was a sales person at KARA(FM). See Finding 24 *supra.* Since 1983 she has been local sales manager of that station. She says that if Empire's application is granted, she will relocate to Healdsburg.

41. During the time Ms. Kilmartin lived within the proposed station's service area (See Finding 38 *supra.*) she was a member of St. Peter's Catholic Church in Cloverdale. And from 1958 to about 1962, she was a member of the Cloverdale Camp Fire Girl Troop.

Auxiliary Power

42. Both applicants propose to use auxiliary power.

CONCLUSIONS OF LAW

1. Deas Communications Inc. and Healdsburg Empire Corporation have filed mutually-exclusive applications to operate a new FM station on Channel 240A in Healdsburg, California. They have presented their evidence and filed their proposed findings of fact and conclusions of law. We must now compare them under the Commission's *1965 Policy Statement on Comparative Broadcast Hearings,* 1 FCC 2d 393, as modified by subsequent Review Board and Commission decisions.

2. Pursuant to the *Policy Statement* we will address the Commission's two primary objectives: (1) selecting the applicant that will offer the greatest diffusion of control of mass communications media; and (2) selecting the applicant that will offer the best practicable service to the public.

3. *Diversification of Mass Media.* Neither Deas Communications, Edgar Mario Deas or any of its principals have any *cognizable* ownership interest in any media of mass communication. Batista Vieria's broadcast ownership interests (Finding 24 *supra.*) are not attributable to Deas since he is a passive shareholder of a non-voting Deas stockholder. He is thus doubly insulated from Deas' operational affairs. Thus Deas' is entitled to maximum credit under the diversification criterion.

4. On the other hand, Empire has seven broadcast interests that are attributable to its principals. See Findings 25-27 *supra.* Four of these holdings are within California, the state of license, and two of those four are within 100

air miles of Healdsburg, the community of license. So Empire must be assigned a decisionally significant demerit under the diversification criterion.

5. It is concluded that a grant of Deas' Communication Inc.'s application will offer the greatest diffusion of control of mass communications media and their application will be granted.

6. *The Best Practicable Service.* If we were to *assume* that Deas' was not eminently superior under diversification, we would then turn to the Commission's secondary primary objective, the best practicable service objective.

7. In analyzing best practicable service there are four potential criterion that might need to be analyzed: First we would have to decide whether any applicant should be preferred because of a superior area and population proposal (comparative coverage); second, we might have to determine the extent each will integrate their principals' ownership into the day-to-day management of the proposed station (quantitative integration); third, and if neither comparative coverage nor quantitative integration proved decisive, we would look at the attributes that each integrated owner would bring to that day-to-day management (qualitative integration); and fourth whether the degree of quantitative and qualitative integration is enhanced by minority ownership.

8. If it became necessary to analyze the third criterion, qualitative integration, we would examine such factors as local residence, participation in civic affairs, past education and business affairs, past education, and business experience, past broadcast experience and auxiliary power.

9. *Criterion 1 - Comparative Coverage:* Comparative coverage is not a factor in deciding this case. There is no significant difference in the size of the areas and populations that Deas and Empire propose which would receive FM service 1 mV/m or greater. Moreover, all the areas which they propose to serve already receive five or more fulltime primary aural services. Those facts are not in dispute, and have been stipulated.

10. *Criterion 2 - Quantitative Integration. Deas* claims and will be credited with 100% quantitative integration. *Empire* claims and will be credited with 21% quantitative integration. That quantitative disparity is decisionally significant. So even *assuming* that Deas' application wouldn't offer the greatest diffusion of control of mass communications media (see Conclusions 3-5 *supra.*), Deas would prevail. This being so, there is no need to analyze the third and fourth best practicable service criterion; i.e. qualitative integration and minority ownership.[2] See Conclusions 7-8 *supra.*; *New Continental Broadcasting Co.*, 88 FCC 2d 830, 50 RR 2d 1117 (1981); *Van Buren Community Service*, 87 FCC 2d 1018; 40 RR 2d 115 (1981); and *Cannon Point Broadcasting Co.*, 93 FCC 2d 643 (R. Bd. 1983) at 649. So even putting diversification to one side, it is Deas that will offer the best practicable service to the Healdsburg, California area.

11. In sum, this case is a laugher. It's no contest. From the outset Deas Communication Inc. has been and remains vastly comparatively superior to Healdsburg Empire Corporation.

12. All too often the Commission's scarce adjudicatory resources are put upon by comparative applicants like Empire, applicants whose *only* adjudicatory weapon is its right of appeal. Yes, Empire can *delay* a grant of Deas' application and service to Healdsburg by exercising that futile right. While this tactic can salve the egos of Empire's stockholders, it surely works to the detriment of the Healdsburg public. One can only hope that Empire will be given *speedy* appellate consideration. If ever a case screams out for the fast track, this one does.

SO, unless an appeal is taken from this Initial Decision or the Commission reviews it on their own motion, Deas Communications Inc.'s application (BPH-910208 MB) IS GRANTED; and Healdsburg Empire Corporation's application (BPH-910212 MM) IS DENIED.[3]

FEDERAL COMMUNICATIONS COMMISSION

Walter C. Miller
Administrative Law Judge

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[2] Note however that Deas' integrated voting stockholder, Mario Edgar Deas, claims and is entitled to minority enhancement. See Finding 35 *supra.*

[3] If exceptions aren't filed within 30 days, or the Commission doesn't review the case on its own motion, this Initial Decision will become effective 50 days after its public release. See 47 CFR 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GTE HAWAIIAN TELEPHONE CO. INC. File No. I-T-C-93-007

Application for authority to lease and operate additional satellite facilities for service between Hawaii and Pacific points.

ORDER AND AUTHORIZATION

Adopted: February 11, 1993; Released: February 24, 1993

By the Chief, International Facilities Division:

1. The above-captioned application, filed on October 6, 1992 by GTE Hawaiian Telephone Co. Inc. (HTC), requests authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to lease and operate additional satellite circuits between the Ewa, Oahu, Hawaii earth station and INTELSAT Pacific Ocean Region (POR) satellites for the provision of authorized services to various pacific points. The application was placed on public notice on October 28, 1992. No comments were received.

2. The Commission's Order and Authorization released April 4, 1990 (File No. CSG-90-019-P/L *et al*, 5 FCC Rcd 2047 (1990)) authorized HTC to construct and operate the Ewa earth station and to establish channels of communication for service to various Pacific points. HTC was authorized to lease from Comsat and operate a total of 341 half-circuits in 1990, 377 half-circuits in 1991 and 424 half-circuits in 1992. The instant application requests extension of blanket authorities[1] for 1993-1995.

3. Upon consideration of the application, we find that grant thereof is required by the public convenience and necessity.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-93-007 IS GRANTED, and HTC is authorized to:

a. lease from Comsat and operate the numbers of voice-grade satellite half-circuits listed in the Appendix between the Ewa, Oahu earth station and an appropriate INTELSAT POR satellite, connecting with similar circuits between the satellite and earth stations at the points listed in the Appendix furnished by HTC's correspondents up to a total of 555 half-circuits in 1993, 600 half-circuits in 1994 and 616 half-circuits in 1995;

b. lease and operate a greater or lesser number of satellite voice-grade half-circuits to each point listed in the Appendix, but not to exceed a total of 555 half-circuits in 1993, 600 half-circuits in 1994 and 616 half-circuits in 1995; and

c. use the facilities specified in paragraphs a and b above to provide HTC's regularly authorized services between Hawaii and the points specified in the attached Appendix.

5. All other terms and conditions of the Commission's blanket Order and Authorization cited in footnote 1 remain the same.

6. HTC shall file a new application for service and satellite facility to points in the Pacific area on or before October 1, 1995.

7. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[1] *See* File Nos. I-T-C-90-037, 5 FCC Rcd 2047 (1990), and I-T-C-90-166, 5 FCC Rcd 7456 (1990).

APPENDIX

Country or Geographical Point	Serving Earth Stations	Satellite Circuit Requirement for Year End 1993	1994	1995
American Samoa	Pago Pago	34	37	40
Australia	Sydney	15	15	15
People's Republic of China	Shanghai	19	25	30
Federated States of Micronesia	Kolonia, Pohnpei Moen, Truk	25	27	30
Fiji	Suva	5	6	7
French Polynesia	Papenoo, Tahiti	14	15	17
Guam	Pulantat	27	34	38
Hong Kong	Hong Kong	22	29	26
India	Kuantan, Malaysia	14	16	18
Indonesia	Djatiluhur	14	15	16
Japan - KDD	Ibaraki	69	69	69
Japan-ITJ	Chiba	30	29	29
Japan-IDC	Chiba	24	24	24
Korea	Boeun	24	28	31
Malaysia	Kuantan	11	12	13
Marshall Islands	Majuro/Ebeye	21	22	24
New Zealand	Warkworth	4	4	4
Palau	Koror	16	17	18
Papua New Guinea	Lae	7	7	8
Philippines	Pinugay	29	29	29
Saipan	Susupe	54	60	44
Singapore	Bakit Timah	20	20	20
Taiwan	Taipei	8	10	13
Thailand	Si Racha	14	12	11
Tonga	Nuku'alofa	13	14	15
Western Samoa	Afiamalu	22	24	26
Total		585	600	616

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

S.V.V. SALES, INC. d/b/a NETWORK TELECOMMUNICATIONS SERVICES Application for authority to operate as an international resale carrier.	File No. I-T-C-93-008
ALTERNATE COMMUNICATIONS TECHNOLOGY, INC. Application for authority to operate as an international resale carrier.	File No. I-T-C-93-010
AMERA TEL COMMUNICATIONS, INC. Application for authority to operate as an international resale carrier.	File No. I-T-C-93-018
PUBLIC COMMUNICATIONS ASSOCIATES LTD., INC. d/b/a PUBLIC PHONE Application for authority to operate as an international resale carrier.	File No. I-T-C-93-020
NATIONWIDE LONG DISTANCE, INC. Application for authority to operate as an international resale carrier.	File No. I-T-C-93-021
COMMUNICATION TELESYSTEMS INTERNATIONAL Application for authority to operate as an international resale carrier.	File No. I-T-C-93-023

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: February 11, 1993; Released: February 24, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested applications, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international switched services to the general public on a resale basis by S.V.V. Sales, Inc. d/b/a Network Telecommunications Services (NTS), Alternate Communications Technology, Inc. (ACT), Amera Tel Communication, Inc. (Amera Tel), Public Communications Associates Ltd., Inc. d/b/a Public Phone, Nationwide Long Distance, Inc. (Nationwide) and Communication TeleSystems International (CTS).

2. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-93-008, I-T-C-93-010, I-T-C-93-018, I-T-C-93-020, I-T-C-93-021 and I-T-C-93-023 ARE GRANTED; and

a. NTS is authorized to provide international switched voice service by the resale of the international switched voice services set forth in West Coast Telecommunications, Inc.'s Tariff F.C.C. No. 1 between the U.S. and international points listed in that tariff;

b. ACT is authorized to provide international switched voice service by the resale of the international switched voice service set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1, Sprint's Tariffs F.C.C. Nos. 1 and 2, TRT/FTC's Tariff F.C.C. No. 15, C&W's Tariff F.C.C. No. 3 and Litel's Tariff F.C.C. No. 1 between the U.S. and international points listed in those tariffs;

c. Amera Tel is authorized to provide international switched voice service by the resale of the international switched voice service set forth in AT&T's Tariffs F.C.C. Nos. 1, 2 and 12, MCI's Tariff F.C.C. No. 1, Sprint's Tariffs F.C.C. Nos. 1 and 2, TRT/FTC's Tariffs F.C.C. Nos. 1 and 12, WorldCom's Tariff F.C.C. No. 1 and HTC's Tariffs F.C.C. Nos. 1 and 2 between the U.S. and international points listed in those tariffs;

d. Public Phone is authorized to provide international switched voice service by the resale of the international switched voice service set forth in Advanced Telecom's Tariff F.C.C. No. 2, AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1, Sprint's Tariffs F.C.C. Nos. 1 and 2, Litel's Tariff F.C.C. No. 1, C&W's Tariff F.C.C. No. 3, Wiltel's Tariffs F.C.C. Nos. 1 and 2 and Metromedia's Tariff F.C.C. No. 2 between the U.S. and international points listed in those tariffs;

e. Nationwide is authorized to provide international switched voice service by the resale of the international switched voice service set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, ATC Long Distance's Tariff F.C.C. No. 2, C&W's Tariff F.C.C. No. 3, MCI's Tariff F.C.C. No. 1, TRT/FTC's Tariff F.C.C. No. 15, Wiltel's Tariff F.C.C. No. 2, LDDS Communications' Tariff F.C.C. No. 1, Litel's Tariff

F.C.C. No. 1, Midatlantic Telecom's Tariff F.C.C. No. 1, US Long Distance's Tariff F.C.C. No. 1, and Sprint's Tariff F.C.C. Nos. 1 and 2 between the U.S. and international points listed in those tariffs; and

f. CTS is authorized to provide international voice service by the resale of the international switched voice services set forth in AT&T's Tariff F.C.C. No. 1, MCI's Tariff F.C.C. No. 1 and Sprint's Tariff F.C.C. No. 1 between the U.S. and international points listed in those tariffs.

3. IT IS FURTHER ORDERED that the applicants shall obtain any necessary operating agreements in each of the countries to which they will provide service and shall file them with the Commission within 30 days of their execution.

4. IT IS FURTHER ORDERED that the applicants shall file tariffs pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

5. IT IS FURTHER ORDERED that the applicants shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

6. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services the applicants seek authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MTX COMMUNICATIONS CORP. — File No. I-T-C-93-011

Application for authority to operate as an international resale carrier.

STANDARD TELCOM LONG DISTANCE, INC. — File No. I-T-C-93-032

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: February 11, 1993; Released: February 24, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested applications, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice service to the general public on a resale basis by MTX Communications Corp. (MTX) and Standard TelCom Long Distance, Inc. (Standard).

2. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-93-011 and I-T-C-93-032 ARE GRANTED; and

a. MTX is authorized to provide international switched voice service by the resale of the international switched voice services set forth in Standard TelCom Long Distance, Inc.'s Tariff F.C.C. No. 1 and Metromedia's Tariffs F.C.C. Nos. 1 and 2 between the U.S. and overseas points listed in those tariffs; and

b. Standard is authorized to provide international switched voice service by the resale of the international switched voice services set forth in Wiltel's Tariffs F.C.C. Nos. 1 and 2, AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1, Sprint's Tariffs F.C.C. Nos. 1 and 2, C&W's Tariff F.C.C. No. 3, Litel's Tariff F.C.C. No. 1, and West Coast Telecommunications' Tariff F.C.C. No. 1 between the U.S. and overseas points listed in those tariffs.

3. IT IS FURTHER ORDERED that the applicants shall obtain any necessary operating agreements in each of the countries to which they will provide service and shall file them with the Commission within 30 days of their execution.

4. IT IS FURTHER ORDERED that the applicants shall file tariffs pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

5. IT IS FURTHER ORDERED that the applicants shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61.

6. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services the applicants seek authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TRT/FTC INTERNATIONAL INC. File No. I-T-C-93-015

Application for authority
to acquire and operate facilities
for direct service between
the U.S. and Uruguay.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: February 16, 1993; Released: Februrary 24, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and Uruguay[1] by TRT/FTC International Inc. (TRT).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-93-015 IS GRANTED, and TRT is authorized to:

a. lease from Comsat and operate 4 voice-grade satellite half-circuits between the Roaring Creek, Pennsylvania earth station and an appropriate Intelsat satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in Uruguay furnished by TRT's correspondent in Uruguay;

b. lease from AT&T and operate 4 voice-grade circuits in the Roaring Creek earth station to be used in conjunction with the satellite space segment capacity;

c. lease and operate 4 voice-grade connecting circuits between the Roaring Creek earth station and TRT's New York operating center; and

d. use the facilities in a, b and c above to provide TRT's regularly authorized services between the U.S. and Uruguay.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of operating agreements between TRT and its correspondent in Uruguay, and a copy of the agreements shall be filed with the Commission within 30 days of its execution; and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules 47 C.F.R. §43.51, and in *Regulation of International Accounting Rates*, Phase II, First Report and Order, 57 Fed. Reg. 646 (1992) (to be codified at 47 C.F.R. §43.51(a)(3)).

5. IT IS FURTHER ORDERED that our authorization of provide private lines is limited to the provision of such private lines only between the United States and Uruguay -- that is, private lines which originate in the United States and terminate in Uruguay or which originate in Uruguay and terminate in the United States. In addition, TRT may not -- and TRT's tariff must state that TRT's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or Uruguay end, or both, for the provision of international switched services, unless authorized to do so by the Commission upon a finding that Uruguay affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1992).

6. IT IS FURTHER ORDERED that neither TRT nor any persons or companies directly or indirectly controlling or controlled by TRT, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which TRT or any persons or companies controlling or controlled by TRT are parties.

7. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

8. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

[1] In its application TRT requests authority to acquire and operate facilities for the provision of common carrier services between the United States and Uruguay and points beyond. We note that should TRT obtain any interest in facilities beyond Uruguay for the purpose of providing common carrier services, including private line service, between the U.S. and other foreign points, such action would constitute an extension of line under Section 214 of the Act. Therefore, under the provisions of the Commission's International Competitive Carrier decision, *International Competitive Carrier Policies*, 102 FCC 2d 812 (1985), *recon. denied* 50 R.R. 2d 1435 (1986), it would be necessary for TRT to file additional applications for a certificate of public convenience and necessity under Section 214 to begin service to each additional country and for authority to acquire any facilities needed to provide service to such additional points.

9. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b).

10. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMPETITIVE TELECOMMUNICATIONS ASSOCIATION, *et al.*,
Complainants,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	File No. E-89-382
NEW JERSEY BELL TELEPHONE COMPANY,	File No. E-89-383
MICHIGAN BELL TELEPHONE COMPANY,	File No. E-89-384
WISCONSIN BELL, INC.,	File No. E-89-385
MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,	File No. E-89-386
NORTHWESTERN BELL TELEPHONE COMPANY,	File No. E-89-387
PACIFIC NORTHWEST BELL TELEPHONE COMPANY,	File No. E-89-388
PACIFIC BELL TELEPHONE COMPANY, and	File No. E-89-389
SOUTHWESTERN BELL TELEPHONE COMPANY,	File No. E-89-390

Defendants,

and

In the Matter of

ADVANCED TELECOMMUNICATIONS CORPORATION and ITS SUBSIDIARIES,
Complainants,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	File No. E-90-353
NEW JERSEY BELL TELEPHONE COMPANY,	File No. E-90-354
MICHIGAN BELL TELEPHONE COMPANY,	File No. E-90-355
WISCONSIN BELL, INC., and	File No. E-90-356
MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-361

Defendants.

MEMORANDUM OPINION AND ORDER

Adopted: February 2, 1993; Released: February 23, 1993

By the Commission:

TABLE OF CONTENTS

Topic	Paragraph No.
I. INTRODUCTION	1
II. BACKGROUND	2 - 4
III. DISCUSSION	5 - 38
A. Liability for Damages	5 - 17
1. Contentions of the Parties	5 - 11
2. Discussion	12 - 17
B. Damages and Interest Claims	18 - 38
1. Damages	18 - 35
a. Contentions of the Parties	18 - 26
b. Discussion	27 - 35
2. Interest on Damages	36 - 38
a. Contentions of the Parties	36 - 37
b. Discussion	38
IV. CONCLUSION	39
V. ORDERING CLAUSES	40 - 46
APPENDIX A	
APPENDIX B	

I. INTRODUCTION

1. In this Memorandum Opinion and Order we find that Competitive Telecommunications Association on behalf of its member companies (CompTel) and Advanced Telecommunications Corporation and its subsidiaries (ATC) have met their burden of establishing that defendants[1] have violated Section 201(b) of the Communications Act by earning in excess of the rate of return prescribed by the Commission for the period October 1, 1985 through December 31, 1986. In addition, we award damages to ATC and CompTel for defendants' violations of the Commission's rate of return prescription for the reasons and to the extent indicated below. We also grant complainants' requests for interest on the damages awarded here.

[1] Defendants are: The Chesapeake and Potomac Telephone Companies (C&P) and New Jersey Bell Telephone Company (NJB) (collectively "Bell Atlantic"); Wisconsin Bell, Inc. (Wisconsin Bell) and Michigan Bell Telephone Company (Michigan Bell) (collectively "Ameritech"); Mountain States Telephone and Telegraph Company (MTN), Northwestern Bell Telephone Company (NWB), and Pacific Northwest Bell Telephone Company (PNB) (collectively "USWC"); Pacific Bell Telephone Company (Pacific Bell); and Southwestern Bell Telephone Company (SWB).

II. BACKGROUND

2. The Commission has previously held that local exchange carriers (LECs) who had earned in excess of the prescribed rate of return for October 1, 1985 through December 31, 1986 violated Section 201(b) of the Communications Act (the "Act").[2] These decisions establish that carrier rates producing earnings in excess of the Commission's prescribed rate of return violate Section 201(b) of the Act[3] and allegations of such overearnings are sufficient to sustain a cause of action under Section 208 of the Act. Furthermore, the Commission has held that complainants may recover damages, including interest, from LECs who violated the Commission's rate of return prescription.[4]

3. While a detailed accounting of the applicable statutory scheme and relevant Commission and court decisions that preceded the filing of the captioned complaints is set forth in the *MCI Liability Order*[5] and will not be repeated here, a brief review of the relevant rate of return prescription is helpful. The Commission prescribed a rate of return of 12.75 percent for the initial monitoring period of October 1, 1985 through December 31, 1986.[6] Because the initial review period would be 15 months rather than the two years of subsequent review periods, the Commission expanded the "buffer"[7] that would be used during this initial monitoring period to determine whether the prescription had been violated.[8] Carriers were given notice that a 13.10 percent level of earnings would be the maximum allowable rate of return on overall interstate earnings and 13.25 percent would be the maximum allowable return for any access service category.[9]

4. In September 1989, CompTel filed its formal complaints against the defendants[10] and ATC filed its formal complaints[11] against defendants in May and June 1990.[12] Complainants alleged violations by the defendants of the Commission's rate of return prescription. In addition, complainants reserved the right to file supplemental complaints for damages as provided for in

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[2] MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co., *et al.*, 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon. denied*, 5 FCC Rcd 3463 (1990) (*MCI Reconsideration Order*) (jointly "*MCI Orders*"); *appeal dismissed sub nom. Mountain States Tel. and Tel. Co., et al. v. FCC*, 951 F.2d 1259 (10th Cir. 1991) (per curiam) and American Telephone and Telegraph Co. v. Northwestern Bell Telephone Co., 5 FCC Rcd 143 (1990), *appeal dismissed sub nom. Mountain States Tel. and Tel. Co., et al. v. FCC*, 951 F.2d 1259 (10th Cir. 1991) (per curiam).

[3] 47 U.S.C. § 201(b). This Section provides, in pertinent part, that "[a]ll charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful."

[4] MCI Telecommunications Corporation v. Pacific Bell Telephone Company, FCC 93-70 (released February 8, 1993) (*MCI Damages Order*).

[5] *MCI Liability Order*, 5 FCC Rcd at 217-218.

[6] *See* Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985) (*Phase I Order*), *on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,033 (Apr. 1, 1986) (*Phase I Reconsideration*), *on further reconsideration*, 2 FCC Rcd 190 (1987). *See also* Procedures and Methodologies to Establish Reporting Requirements, CC Docket No. 86-127, FCC 86-514 (released Dec. 3, 1986), 52 Fed. Reg. 273 (Jan. 5, 1987).

[7] *See MCI Liability Order*, 5 FCC Rcd at 217:

> ... the Commission established both an authorized rate of return and a 'spread' or 'buffer' above that return for use in proceedings relating to the enforcement of the prescription. In other words, the authorized return would be employed in computing tariff rates; the spread, or buffer, would be used in combination with the authorized return 'to determine whether a rate of return prescription has been violated.' [footnote omitted.]

[8] *Phase I Order*, 50 Fed. Reg. at 41,352 (para. 21).

[9] 47 C.F.R. § 65.701(b).

[10] CompTel and defendants have settled portions of the complaints resulting in partial dismissals of those complaints. Competitive Telecommunications Association, *et al.* v. Southwestern Bell Telephone Company, DA 93-80 (Com.Car.Bur. released January 29, 1993) dismissing the claims of Litel Telecommunications Corporation against SWB; Competitive Telecommunications Association, *et al.* v. Southwestern Bell Telephone Company, 7 FCC Rcd 5585 (Com.Car.Bur. 1992) dismissing the claims against SWB of American Telco, Inc., ITT Communications Services, Inc., Metromedia Long Distance, Inc., NTS Communications, Inc., Telus Communications, Inc. and Westel, Inc.; Competitive Telecommunications Association, *et al.* v. Wisconsin Bell, Inc., 6 FCC Rcd 399 (Com.Car.Bur. 1991) dismissing the claims of Schneider Communications, Inc. against Wisconsin Bell.

[11] ATC initially filed informal complaints against the defendants pursuant to Sections 1.716 *et seq.* of the Commission's rules, 47 C.F.R. §§ 1.716 *et seq.* ATC states that (1) the captioned formal complaints were filed within six months of the defendants' reports in response to the informal complaints, (2) make references to the filing dates of the informal complaints, and (3) are based on the same cause of action as the informal complaints. *See* ATC's Verified Complaint, File No. E-90-353, at para. 4; ATC's Verified Complaint, File No. E-90-354, at para. 4; ATC's Verified Complaint, File No. E-90-355, at para. 4; ATC's Verified Complaint, File No. E-90-356, at para. 4; and ATC's Verified Complaint, File No. E-90-361, at para. 4. Accordingly, the captioned complaints relate back to the filing date of the informal complaints pursuant to Section 1.718 of the Commission's rules, 47 C.F.R. § 1.718. We note that defendants have not challenged the relation back of the formal to the informal complaints.

[12] Due to the similarity of the issues and arguments raised by the parties, the complaints have been consolidated for disposition. These complaints were held in abeyance by the Commission pending resolution of a court remand in *Illinois Bell Tel. Co. v. FCC*, 911 F.2d 776 (D.C. Cir. 1990). *See* Advanced Telecommunications Corporation v. Pacific Bell Telephone Company, *et al.*, 6 FCC Rcd 656 (Com.Car.Bur. 1991) and Competitive Telecommunications Association, *et al.* v. The Chesapeake and Potomac Telephone Companies, *et al.*, 6 FCC Rcd 639 (Com.Car.Bur. 1991). The Commission acted on the remand in October 1991. *See* Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, Decision on Remand, 7 FCC Rcd 296 (1991), *appeal docketed sub nom. Illinois Bell Telephone Co., et al. v. FCC*, No. 90-1020 (D.C. Cir. Jan.11, 1991). Ameritech filed a motion to, among other things, hold these complaints in abeyance pending the Commission's action on the remand. Because we have acted on the remand, Ameritech's motion is moot and is dismissed. On December 13, 1991, and January 13, 1992, the Enforcement Division of the Common Carrier Bureau released orders that reactivated the instant cases. *See* Advanced Telecommunications Corporation v. Pacific Bell Telephone Company, *et al.*, 7 FCC Rcd 401

Section 1.722 of the Commission's rules[13] because they could not determine the precise amount of damages they suffered at the time their complaints were filed. The majority of defendants filed answers and motions to dismiss. In June 1992, the Common Carrier Bureau (Bureau) released orders establishing further discovery[14] and briefing schedules for these proceedings.[15] Pursuant to the *Discovery Orders*, the parties submitted their initial briefs and reply briefs setting forth their respective claims and arguments.[16]

III. DISCUSSION

A. Liability for Damages

1. Contentions of the parties

5. Complainants allege that the rates they paid for certain of the defendants' interstate access services during the period from October 1, 1985 through December 31, 1986 were unjust and unreasonable in violation of Section 201(b) of the Act. Complainants support their allegations with evidence taken from reports filed with the Commission by the defendants for the 15-month period at issue that show that defendants achieved earnings in excess of the Commission's prescribed rate of return on one or more of the three interstate access categories established for the purpose of enforcing that rate of return prescription.[17]

(Com.Car.Bur. 1992) and Competitive Telecommunications Association, *et al.* v. The Chesapeake and Potomac Telephone Companies, *et al.*, 6 FCC Rcd 7288 (Com.Car.Bur. 1991).

[13] 47 C.F.R. § 1.722.

[14] CompTel propounded interrogatories to each of the defendants in its complaint proceedings. With the exceptions of Pacific Bell and SWB, each defendant propounded interrogatories to CompTel. ATC propounded interrogatories to each of the defendants in its complaint proceedings. Each defendant propounded interrogatories to ATC. On June 1992, Ameritech filed Motions to Serve Request for Production of Documents (accompanied by Request for Production of Documents) on CompTel and ATC. Complainants opposed these motions. We dismiss the motions as moot. On July 24, 1992, Ameritech filed a Motion to Compel Response to Interrogatories on CompTel. ATC filed a Motion to Compel Responses to Interrogatories on Ameritech on July 29, 1992. Both motions to compel are moot and are dismissed accordingly.

On July 24, 1990, ATC filed motions to strike the answers filed by C&P, NJB, Michigan Bell, and Wisconsin Bell. The defendants opposed the motions to strike. We will dismiss the motions to strike as moot. The parties have had ample opportunity to present their arguments and respond to each other's arguments in the briefs and reply briefs filed in these proceedings.

[15] Advanced Telecommunications Corporation v. Pacific Bell Telephone Company, 7 FCC Rcd 3891 (Com.Car.Bur. 1992) and Competitive Telecommunications Association, *et al.* v. The Chesapeake and Potomac Telephone Companies, *et al.*, 7 FCC Rcd 4863 (Com.Car.Bur. 1992) (*Discovery Orders*).

As a preliminary matter, we note that USWC has stated that it filed its brief directly with the Commission because it could find no order delegating damages authority to the Bureau. In addition, USWC formally objects if the Bureau is deciding these cases under delegated authority because it contends that the Bureau has been performing investigative and prosecutorial functions in these proceedings and cannot, under Section 554(d) of the Administrative Procedure Act (5 U.S.C. § 554(d)), act as decision maker herein. USWC Br. at 2, n.7. While we agree with USWC that the damages issue must be decided by the Commission, 47 U.S.C. § 155(c)(1), the Bureau may deal with interlocutory matters such as discovery issues. We also disagree with USWC's characterization of the Bureau's activities regarding these complaint proceedings. The Bureau has at all times been acting as the "decision maker" and not as an "investigator" or "prosecutor."

[16] In the instant proceedings, the complainants and the defendants all filed briefs and reply briefs pursuant to the schedules established by the Bureau between June and September, 1992. The arguments and claims made by the various complainants and defendants are, for the most part, identical in their essentials. For convenience and clarity, we refer to the complainants' arguments or the defendants' arguments, as the case may be, as if they were part of the same pleadings. To the extent that individual complainants or defendants make unique or separate arguments, we address them accordingly.

CompTel filed a brief for File Nos. E-89-384 through E-89-390 on July 29, 1992 (CompTel Br.1) and filed a brief for File Nos. E-89-382 and E-89-383 on August 31, 1992 (CompTel Br.2). Ameritech filed its brief on July 29, 1992 (Ameritech Br.1) as did USWC (USWC Br.), Pacific Bell (Pacific Bell Br.) and Southwestern Bell (SWB Br.). Bell Atlantic filed its brief on August 31, 1992 (Bell Atlantic Br.1). CompTel filed its first reply brief on August 10, 1992 (CompTel RBr.1) and its reply brief in the Bell Atlantic proceedings on September 8, 1992 (CompTel RBr.2). Ameritech filed its reply brief on Augusth)10, 1992 (Ameritech RBr.1) as did Pacific Bell (Pacific Bell Br.) and Southwestern Bell (SWB Br.). Ameritech filed its reply brief on August 13, 1992 (Ameritech RBr.). Bell Atlantic filed its reply brief on September 10, 1992 (Bell Atlantic RBr.1).

ATC filed individual briefs in each of the proceedings on August 10, 1992. These briefs will be referred to as follows; ATC Br. File No. E-90-_____. Bell Atlantic filed its brief on August 10, 1992 (Bell Atlantic Br.2) as did Ameritech (Ameritech Br.2) and MTN (MTN Br.). ATC filed its reply briefs on August 20, 1992. ATC's reply briefs will be referred to as follows: ATC RBr. File No. E-90-_____. Bell Atlantic filed its reply brief on August 20, 1992 (Bell Atlantic RBr.2) as did Ameritech (Ameritech RBr.2). MTN filed its reply brief on August 25, 1992 (MTN RBr.).

[17] The interstate access service categories are special access, common line, and switched traffic sensitive. *See* 47 C.F.R. § 65.702 (1990). Complainants state that the monitoring reports recite that for the period October 1, 1985 through December 31, 1986, C&P earned a return of 13.38% in the switched traffic sensitive category; New Jersey Bell earned a return of 14.74% in the switched traffic sensitive category; Michigan Bell earned a return of 13.37% in the switched traffic sensitive category; Wisconsin Bell earned a return of 16.66% in the switched traffic sensitive category; MTN earned returns in the switched traffic sensitive category of 14.60% in Arizona, 15.81% in Idaho, 15.20% in Montana, 14.97% in New Mexico, 13.67% in Utah and 14.93% in Wyoming; and NWB earned returns in the special access category of 14.31 in Iowa, 13.85% in Minnesota,

6. Complainants request that the Commission declare that the defendants' charges for the period from October 1, 1985 through December 31, 1986 are in violation of the rate of return prescription and Section 201(b) of the Act, and order the defendants to pay damages to complainants equal to the difference between the amount actually paid by complainants for interstate access service during the period and the amount that complainants would have paid if the defendants' charges earned no more than the maximum allowable rate of return, plus interest.

7. The defendants raise a number of issues that have been fully considered by the Commission in the *MCI Orders*. They will be briefly discussed below.

8. Defendants advance a variety of arguments to support their claim that complainants have failed to state causes of action under the Act. Primarily, the defendants argue that complainants' claims are barred by *American Telephone and Telegraph v. FCC*.[18] These arguments take on several forms. Defendants contend that renaming a "refund" as a "damage award" does not cure the inconsistencies the court found with respect to the automatic refund rule and allow the awarding of damages in the instant complaints.[19] The defendants argue that the Commission must consider underearnings in determining whether particular overearnings are in violation of the Act.[20] Finally, the defendants argue that it is contrary to *AT&T v. FCC* to find a rate of return violation when overall earnings for interstate access service did not exceed 13.10 percent regardless of access category earnings in excess of 13.25 percent.[21]

9. Defendants also argue that the Commission is engaging in retroactive ratemaking should it order a carrier to make refunds solely because the carrier has exceeded the authorized rate of return.[22] Additionally, defendants argue that the Commission's action in CC Docket No. 84-800 did not create a private cause of action that would permit an individual remedy.[23] USWC also argues that rates charged in conformity with a lawfully filed tariff cannot then be found to be unjust and unreasonable merely because they later proved to be too profitable.[24] Finally, Ameritech argues that its rates were not carrier-initiated, but rather were prescribed by the Commission and, therefore, are not susceptible to refunds or damages claims.[25]

10. Defendants also argue that the decision in *Ohio Bell*, issued after the release of the *MCI Liability Order*, requires dismissal of complainants' complaints.[26] According to the defendants, *Ohio Bell* reaffirms the proposition established in *AT&T v. FCC* that the Commission cannot award damages for carrier overearnings without allowing the carrier to re-coup or off-set underearnings.[27] Defendants contend that these propositions are not confined to the Commission's ratemaking activities under Sections 204-205 of the Act[28] but are equally applicable when the Commission decides private complaints for damages under Section 208 of the Act.

13.63% in Nebraska, and 16.01% in North Dakota and earned returns in the switched traffic sensitive category of 14.64% in Iowa, 14.33% in Minnesota, 15.79% in Nebraska and 19.71% in North Dakota; PNB earned returns in the switched traffic sensitive category of 14.47% in Oregon and in the special access category of 15.09% in Idaho; Pacific Bell earned a return of 14.51% in the switched traffic sensitive category; and Southwestern Bell earned returns in the switched traffic sensitive category of 14.21% in Arkansas, 16.21% in Kansas; 14.93% in Missouri and earned returns in the special access category of 15.43% in Missouri and 15.99% in Oklahoma.

18 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*) . The court invalidated the Commission's procedure to enforce its rate of return prescriptions through automatic refunds of carrier overearnings to customers. For a detailed discussion of *AT&T v. FCC*, *see MCI Liability Order*, 5 FCC Rcd at 221-223. The U.S. Court of Appeals for the Sixth Circuit, relying on *AT&T v. FCC*, vacated a Commission order dealing with refunds of earnings in excess of the authorized rate of return for the special access category over a period of years in the context of a strategic pricing investigation. *See Ohio Bell Tel. Co. v. FCC*, 949 F.2d 864(6th Cir. 1991) (*Ohio Bell*). The court primarily relied upon the statement from *AT&T v. FCC* that a rate of return prescription is both a minimum and a maximum prescription. *See AT&T v. FCC*, 836 F.2d at 1390. The Commission has clarified, however, that it does not view a rate of return prescription as both a maximum and a minimum and has stated that

> [o]ur accumulated experience with rate of return prescriptions, and our review of the cost of capital evidence in this proceeding, convince us that there is no such point. * * * We believe there is a substantial gap between an earnings level that is fully adequate to assure attraction of capital on favorable terms, and an earnings level which, if sustained over time, would be confiscatory.

Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, 5 FCC Rcd 7507, 7532 (1990), *appeal docketed sub nom. Illinois Bell Telephone Co. v. FCC*, No. 90-1020 (D.C. Cir. Jan. 11, 1991).

19 *See, e.g.*, Pacific Bell Br. at 8; USWC Br. at 6.

20 *See, e.g.*, Bell Atlantic Br.2 at 10-12.

21 *See, e.g.*, SWB Br. at 6; Bell Atlantic Br.1 at 4-5. Extending this argument even further, USWC contends that the key rate of return with which complainants should be concerned is the overall earnings of USWC in the aggregate, not the individual categorical earnings of USWC's subsidiaries. In the aggregate, USWC earned 12.73% overall. USWC's Joint Answer, Affirmative Defenses, Contingent Cross Complaint and Motion to Dismiss (USWC Joint Motion) at para. 16.

22 *See, e.g.*, USWC Br. at 6-7. Defendants also argue that under *Illinois Bell Telephone Co. v. FCC*, 966 F.2d 1478 (D.C. Cir. 1992) (*Illinois Bell*), the Commission may only engage in prospective ratemaking when the investigative and accounting requirements of §204(a) have not been met. *See, e.g.*, Pacific Bell Br. at 10-11.

23 *See, e.g.*, Pacific Bell Br. at 14-17.

24 USWC Joint Motion at para. 20.

25 *See, e.g.*, Ameritech Br.1 at 14-16.

26 *See, e.g.*, Ameritech RBr.1 at 12; Pacific Bell Br. at 6-8.

27 *See, e.g.*, Pacific Bell Br. at 7. SWB goes even further, arguing that offsets are not sufficient and that recoupment is necessary where defendants underearned on a company-wide bases. SWB contends that, if overearnings are calculated on a customer-specific category basis, it would have to make refunds to certain customers for category overearnings while have no method of recouping category underearnings from other customers. SWB Br. at 6-7.

28 47 U.S.C. §§ 204-205.

11. Each of the defendants argues that all of complainants' claims are barred by Section 415 of the Act, which establishes a two-year statute of limitations on the filing of complaints.[29] According to the defendants, Section 415 bars the recovery of any damages if sought more than two years after the occurrence of any overearnings.[30]

2. Discussion

12. We have carefully examined the record before us and conclude that the defendants have cited no facts and have made no arguments here that would warrant a ruling contrary to the *MCI Orders*.

13. *Failure to State a Cause of Action:* In the *MCI Liability Order*, we rejected identical claims and held that *AT&T v. FCC* establishes no precedent that bars an individual complainant from seeking a remedy under Section 208 of the Act for damages based on a carrier's reported overearnings.[31] We stated that

> we are not persuaded by the defendants' claims that earning in excess of a prescribed rate of return does not violate that Act or, if it does, that the Commission *is required* to take a carrier's underearnings as well as its overearnings into account in determining whether a violation has occurred.
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> * * * * * * *
>
> We find that a valid prescription bound the defendants to a maximum earnings limitation, and the defendants admit that they earned in excess of that amount during the period in question.[32]

We found further that *AT&T v. FCC* did not govern Section 208 complaint proceedings. The Commission has the authority to order a carrier to pay damages if a complainant meets the burden of establishing both a violation of the Act and the actual injury.[33]

14. In addition, we have previously held that enforcement of a rate of return prescription is not retroactive ratemaking because the obligation being enforced was set prospectively when the prescription was adopted.[34] Defendants have not persuaded us to alter our decision. We have also rejected the contention that rates charged in conformity with a lawfully filed tariff cannot be unjust and unreasonable.[35] We point out that the issue is not the lawfulness of high profits in the abstract, but the lawfulness of profits in excess of a prescription. Accordingly we hold that, taking into account the buffer, profits in excess of a prescription are unjust and unreasonable.

15. *Rates Prescribed by the Commission:* Ameritech's argument that the complaints are barred because the rates in effect during the period in question were prescribed by the Commission was discussed at length and rejected in the *MCI Liability Order* and requires no further discussion here.[36] Ameritech has raised no new issues or set forth arguments that would persuade us to depart from our holdings.

16. *AT&T v. FCC* and *Ohio Bell:* We disagree with the defendants' claim that *Ohio Bell* and *AT&T v. FCC* compel us to dismiss complainants' complaints. As we emphasized in the *MCI Liability Order* and reaffirmed in the *MCI Damages Order*, automatic refunds and refunds ordered under Section 204 of the Act are different from individual actions for damages under Section 208. Unlike the automatic refund mechanism in *AT&T v. FCC* or the refund procedure in *Ohio Bell*, both of which resulted from rulemaking proceedings initiated at the Commission's discretion, individual actions for damages under Section 208 are initiated by private parties seeking damages for injuries to themselves; those private parties have the burden of establishing both a violation of the Act and actual injury.[37] The courts in *AT&T v. FCC* and *Ohio Bell* did not discuss private complaints for damages; they did not invalidate private actions for damages; and their holdings are not applicable to the different separately authorized complaint procedure set forth in Sections 206-209. Accordingly, those decisions do not require us to depart from our holding in the *MCI Liability Order* that defendants have violated the Communications Act by earning in excess of a valid rate of return prescription, thereby making their rates unjust and unreasonable under Section 201 of the Communications Act and themselves liable for damages to the extent a complainant can establish that it was damaged as a result of the violation.[38]

17. *Statute of Limitations:* We held in the *MCI Liability Order* that the date a carrier files its final rate of return monitoring report is dispositive with regard to the date a complainant discovers the right or wrong or the facts on

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[29] Section 415 provides, in pertinent part, that "[a]ll complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after...." 47 U.S.C. § 415(b). The term "overcharges" is defined in Section 415 "to mean charges for services in excess of those applicable thereto under the schedules of charges lawfully on file with the Commission." 47 U.S.C. § 415(g).

[30] *See* USWC Joint Motion at para. 21; Pacific Bell Answer at para. 21; SWB Motion to Supplement Brief at Exhibit A.

[31] *MCI Liability Order*, 5 FCC Rcd at 222-23.

[32] *Id.* at 223 [emphasis in the original] [footnote omitted].

[33] *Id.* at 222-23.

[34] *Id.* at 222. We reject defendants' claim that the decision in *Illinois Bell* somehow leaves this Commission only with Section 205 authority in the face of a violation of our rate of return prescription. As we explained in the *MCI Damages Order*, *Illinois Bell* addresses the Commission's authority under Section 204, not Section 208. *See MCI Damages Order* at para. 27. The defendants' claim that the *Illinois Bell* decision deprives the Commission of authority to award damages for violations of a valid rate of return prescription has no merit.

[35] *MCI Liability Order*, 5 FCC Rcd at 222.

[36] *Id.* at 222-23, para. 55.

[37] *See id.* at 222-23. USWC filed contingent cross-complaints against CompTel claiming its pro rata portion of those sums due and owing to USWC for those access elements and in those study areas where USWC earned below its authorized rates of return. We deny USWC's contingent cross-complaints. As we stated in the *MCI Liability Order*, "[t]here is no basis for such complaints under the Act." *See id.* at 223, n.60. USWC has not persuaded us to depart from this holding.

[38] *Id.* at 226.

which such knowledge is chargeable as a matter of law.[39] Defendants have made no argument that persuades us to alter this determination. Accordingly, Section 415 does not bar CompTel's and ATC's complaints.

B. Damages and Interest Claims

1. Damages

a. Contentions of the Parties

18. Complainants' damages claims rest primarily on the contention that the proper measure of the damages they incurred as a result of defendants' violations is the difference between the amount they actually paid defendants for interstate access services during the October 1, 1985 through December 31, 1986 period and the amount they would have paid if the defendants' rates had produced earnings that did not exceed the Commission's prescribed rate of return. In the *Discovery Orders*, the Bureau stated that it tended to agree, in principle, that a possible measure of the damages stemming from defendants' rate of return violations could be that difference.[40] The Bureau was not persuaded on the record before it, however, that a damages determination based solely on such a measure necessarily reflected actual damages incurred by complainants.[41] The defendants were invited to submit evidence that could serve to mitigate or otherwise reduce complainants' damages claims. Specifically, the Bureau stated that evidence demonstrating that complainants' share of excessive earnings realized in a particular access category by a defendant could be offset or otherwise reduced due to facts and circumstances surrounding complainants purchase of other interstate access services from such defendant for the relevant monitoring period might be relevant.[42]

19. The defendants challenge complainants' damages claims on a number of grounds, raising several arguments that were previously considered and rejected by the Commission in the *MCI Liability Order* and the *MCI Damages Order*. Defendants contend that by simply basing their damages claims on a calculation of complainants' prorated share of category-level overearnings, complainants asks the Commission to award them damages in the same amounts they would have received under the automatic refund rule invalidated by the court in *AT&T v. FCC*.[43] The defendants maintain that such a result is expressly precluded by *AT&T v. FCC*. The defendants add that the decision in *Ohio Bell* precludes an award of damages based solely on category level overearnings.

20. Defendants next contend that, even if *AT&T v. FCC* and *Ohio Bell* do not preclude complainants' damages claims, the claims still fail because complainants' complaints do not establish a valid cause of action. According to defendants, to pursue a damages claim, complainant must first show that the defendants charged unjust and unreasonable rates for interstate access services during the period in question, not that defendants' rates produced excessive returns in individual service categories.[44] Moreover, defendants argue, Section 206 of the Act[45] requires complainants to prove injury, causation, and the amount of damages in addition to establishing a violation of the Act.[46] Defendants maintain that by simply referencing defendants' earned rates of return for individual access service categories, complainants have not only failed to allege any facts that would establish that defendants' rates were unjust and unreasonable during the period in question but have also failed to show that they sustained actual damage as a result of those rates.[47]

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[39] In the *MCI Liability Order* we stated:

> the defendants filed the rate of return monitoring reports which...were developed by the Commission for several purposes, including making information about carrier earnings public[ly] available. Moreover, the monitoring reports relied on by MCI in its complaints were specifically designated by the Commission as a "final" and conclusively binding determination of a carrier's earnings.

5 FCC Rcd at 225. We note further that we have previously held that Section 415(e) is inapplicable to the type of complaints we deal with here. *See MCI Reconsideration Order*, 5 FCC Rcd at 3464. Section 415(e) concerns a carrier's liability to its customers for failure to transmit a message in accordance with its common carrier obligations. The instant complaints deal with the lawfulness of defendants' rates, not defendants' transmissions or obligations to transmit messages properly. *See id.*

[40] 7 FCC Rcd at 3522, para. 6 and 7 FCC Rcd at 3850, para. 6.

[41] *Id.*

[42] *Id.*

[43] *See, e.g.*, USWC Br. at 5-6; MTN Br. at 4-6. In addition, defendants contend that *Ohio Bell* makes clear that it was the end result of the automatic refund mechanism, not the mechanism itself, that was unlawful. *See, e.g.*, Pacific Bell Br. at 7.

[44] For example, USWC argues that complainants must specify an identifiable rate that they paid that was too high or too low. USWC Br. at 10-13; MTN Br. at 10-12. In addition, USWC cites to a 1970 circuit court decision to support its claim that where retroactive relief is ordered for rates paid pursuant to a tariff that is subsequently found unjust and unreasonable, the Commission must determine what a just and reasonable rate is. USWC Br. at 11 and MTN Br. at 11, citing to *Middlewest Motor Freight Bureau v. United States*, 433 F.2d 212, 232 (8th Cir. 1970) (*Middlewest*), *cert. denied*, 402 U.S. 909 (1971). As we determined in the *MCI Damages Order*, USWC's reliance on *Middlewest* is misplaced. *MCI Damages Order* at n.56.

[45] *See* 47 U.S.C. § 206.

[46] *See, e.g.*, Pacific Bell Br. at 17-18; Bell Atlantic Br.1 at 7-9; SWB Br. at 3.

[47] *See, e.g.*, Pacific Bell Br. at 17-18; USWC Br. at 12. Defendants contend that the principle that complainants must still prove they were damaged and in what amount was established by the Supreme Court in *Southern Ry. Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 454-55 (1979) (*Seaboard*), in construing relevant sections of the Interstate Commerce Act. *See, e.g.*, Bell Atlantic Br.1 at 9; Ameritech Br.1 at 20-21. The Court stated:

> [O]ur sole concern is the Commission's decision not to investigate under § 15(8)(a) [204], a decision that has only two final consequences. First, the burden of proof with regard to *reasonableness* is placed on the shipper under § 13(1) [208] rather than on the carrier, who would have borne it in a § 15(8)(a) [204] proceeding. (With respect to

21. The defendants each raise distinct arguments to support their claims that an award of damages to complainants based on carrier overearnings is inappropriate for equitable and policy reasons. USWC vigorously argues that complainants are actually seeking restitution or a refund of tariffed charges, not damages.[48] USWC argues that regardless of how complainants characterize the relief they seeks, any form of refund or restitution to complainants would be contrary to the public interest.[49] USWC further contends that an award of damages would be inequitable because (i) USWC's total corporate rate of return would be driven below the confiscatory level; (ii) there was uncertainty surrounding the tariff filings during the relevant period; and (iii) complainants would receive windfalls that would be inconsistent with sound equitable principles.[50]

22. For its part, Pacific Bell argues that CompTel's claim for damages is flawed because CompTel simply assumes that lower rates would have produced lower earnings and offers no probative evidence to show what a reasonable rate would have been or to otherwise support its damages claims.[51] Pacific Bell argues, as does USWC, that CompTel would receive a windfall if it has passed the "overcharges" on to its customers and is now awarded damages.[52] Pacific Bell argues that had its access charges to CompTel been lower in 1985-1986, it is almost certain that CompTel's rates to its customers would have been lower.[53] Pacific Bell cautions the Commission to look at the "backdrop of the practical consequences" and ensure that any decision granting complainants "refunds" is equitable under the circumstances.[54] Pacific Bell further argues that, should the Commission award damages to CompTel, the Commission should order CompTel to pass the damages through to its end users in the form of a rate reduction.[55]

23. Finally, defendants argue that any award of damages to complainants based on category overearnings should be reduced by defendants' category underearnings.[56]

24. Complainants counter that defendants' threshold arguments regarding the effect of the court's ruling in *AT&T v. FCC* have largely been rejected or precluded by the *MCI Liability Order*.[57] Complainants state that defendants' arguments that they have failed to allege and prove violations of the Act and actual damage are unfounded because they have made a sufficient showing of each under traditional principles governing its statutory right to such relief. According to complainants, the only injury and causation they need show are the injury and causation arising from their payment of excessive rates for services they purchased from defendants during the relevant period. Complainants maintain that they have shown that defendants charged them rates that produced earnings in excess of the Commission's prescribed rate of return and argue that their damages are the excessive charges that they paid.[58]

25. Complainants further argue that equitable considerations are relevant only to the Commission's public enforcement remedies and not to private complaints for damages because the Commission has no discretion in the award of damages under Sections 206-209 of the Act.[59] Complainants reiterate that their claims are actions for damages under Section 206-209 of the Act, not for restitution or refunds.

26. Complainants next argue that defendants' offset arguments should be rejected because the Commission has already held that cross-subsidies between earning categories are not allowed.[60]

> all other aspects of lawfulness, however, the burden is borne by the shipper in both proceedings.) Second, the shipper's relief, if unlawfulness is proved, is limited under § 13(1) [208] to actual damages rather than the full refund of overcharges available under § 15(8)(a) [204].

Defendants state that this ruling has been found applicable to proceedings under the Communications Act. *See Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221, 1235 n.35 (D.C. Cir. 1980) (*ARINC*), *cert. denied*, 451 U.S. 920 (1981). Here too, as we determined in the *MCI Damages Order*, defendants' reliance on case precedent is misplaced. *MCI Damages Order* at n.59.

[48] *See also* Ameritech Br.1 at 21-22.

[49] USWC Br. at 13-19; MTN Br. at 13-19. USWC argues that complainants must plead their cases in equity and the Commission may only award refund/damages if we find that the public interest will be served by refund/damages awards to complainants. USWC contends that the leading case in this area is *Moss v. Civil Aeronautics Board*, 521 F.2d 298 (D.C. Cir. 1975) (*Moss*), *cert. denied sub nom. Roberts v. Civil Aeronautics Board*, 424 U.S. 966 (1976), *reh'g denied*, 425 U.S. 966 (1976). USWC states that the refund in *Moss* "was governed by the equitable principles governing the law of restitution." USWC Br. at 15 and MTN Br. at 15, citing to *Moss*, 521 F.2d at 304. We addressed this argument in the *MCI Damages Order* and found USWC's reliance on *Moss* to be misplaced. *MCI Damages Order* at n.60.

[50] USWC Br. at 17-19; MTN Br. at 17-19.

[51] Pacific Bell Br. at 19. *See also* Bell Atlantic Br.1 at 9-10.

[52] *See, e.g.*, Pacific Bell Br. at 18-19.

[53] *Id.* at 19. Pacific Bell cites to numerous newspaper and magazine articles to support this contention.

[54] *Id.* at 20. *See also* USWC Br. at 15 and Ameritech Br.1 at 23, citing to *Las Cruces TV Cable v. FCC*, 645 F.2d 1041 (D.C. Cir. 1981) (*Las Cruces*). In *Las Cruces*, the court upheld, in part, and remanded, in part, a Commission decision requiring refunds under Section 204 of the Act. The court noted that *Las Cruces*

> is the first time that the Federal Communications Commission has attempted to articulate standards governing its award of refunds to customers of a communications common carrier under Section 204 of the Act.

645 F.2d at 1046. Defendants' reliance on *Las Cruces* is unavailing, however, because equitable considerations that may impact a Section 204 investigation are not applicable in individual Section 208 complaint proceedings.

[55] Pacific Bell Br. at 20-21.

[56] *See, e.g., id.* at 22; Bell Atlantic Br.1 at 11-12; Ameritech Br.1 at 23-25.

[57] *See, e.g.*, CompTel Br.1 at 5-6; ATC Br. File Nos. E-90-353--354 at 13-15.

[58] *See, e.g.*, CompTel RBr.2 at 6; ATC RBr. File Nos. E-90-355--356 at 8-9.

[59] *See, e.g.*, ATC Br. File Nos. 355--356 at 14-15.

[60] *See, e.g.*, CompTel RBr.1 at 9. *See also* ATC RBr. File Nos. E-90-355--356 at 13-14 ("Acceptance of the set-off argument advanced by [d]efendant[s] would effectively repeal the category rate of return prescription....").

b. Discussion

27. *AT&T v. FCC and Ohio Bell:* The defendants' claims that the holdings in *AT&T v. FCC* and *Ohio Bell* control these proceedings and bar an award of damages to complainants are without merit for the reasons stated in both the *MCI Liability Order* and the *MCI Damages Order*. In the liability section above, we again emphasized that the court in *AT&T v. FCC* explicitly acknowledged the Commission's authority to order a carrier to disgorge earnings in excess of a rate of return prescription,[61] finding only the remedy component of the Commission's rate of return prescription (the automatic refund mechanism) to be unlawful.[62] More to the point, we emphasized that "the [*AT&T v. FCC*] opinion does not address Section 208 complaint proceedings nor purport to alter the statutory scheme of the Act or the remedies Congress established therein."[63] Similarly, as we stated in the *MCI Damages Order*, the *Ohio Bell* decision does not expand upon *AT&T v. FCC* and does not address the Commission's authority to award damages in private complaint actions under Section 208 of the Act.[64]

28. *Section 201(b) of the Act:* We turn now to the defendants' contention that complainants' damages claims must be dismissed because complainants have failed to prove defendants' rates were unjust and unreasonable within the meaning of Section 201(b) of the Act. In the liability section above, we held that complainants met their burden of proof by establishing that the defendants violated our rate of return prescription.[65] Accordingly, the question before us now is not whether defendants' rates were unjust and unreasonable; rather the question now is whether the complainants suffered any measurable damage as a consequence of paying rates previously determined by the Commission to be unlawful under Section 201(b).

29. The defendants next claim, that even if complainants have sustained their burden and shown that defendants' rates were unjust and unreasonable, their damages claims must still fail because judicial precedent compels complainants to establish what a just and reasonable rate would have been as a prerequisite to pursuing damages claims based on unreasonable rates, has previously been discussed and rejected by the Commission. In the *MCI Damages Order* we reemphasized[66] the Commission's authority to prescribe and enforce carriers' rates of return, pointed out that the issue in these proceedings is not whether individual rates are unlawful, but whether cumulative rates that produced earnings over and above a prescribed rate of return are unjust and unreasonable, and agreed with the Bureau's determination in the *Discovery Order* that a proper starting point for assessing damages based on violations of a rate of return prescription is to look at the difference between the amount complainant paid for defendants' interstate access services and the amount it would have paid if defendants had charged rates that produced returns within the Commission's prescribed levels.[67] We said, "[i]t is appropriate and consistent with the Commission's rate of return regulatory scheme to inquire as to earnings in excess of prescribed levels for purposes of assessing damages claims."[68] Complainants have shown that they purchased services from defendants at rates that produced earnings over and above the defendants' prescribed levels. We previously determined in the *MCI Liability Order* that a violation of such a prescription constitutes a violation of the Act for which damages may lie.

30. *Damages and Offsets:* The defendants' arguments are devoted primarily to attempting to persuade the Commission that complainants' damages claims are really claims for restitution or refunds governed by equitable or public policy considerations. These considerations, according to defendants, militate against any award of damages to complainants based on excessive earnings. The defendants argue, in effect, that the damages complainants seek are equivalent to refunds that would have been required under the refund mechanism invalidated by the court in *AT&T v. FCC*. We do not agree. We are concerned here with determining whether particular customers, who have availed themselves of a statutory complaint remedy under Title II of the Act, have sustained any measurable damage that can be traced to defendants' violations of the Act. Although a damages award under Section 208 of the Act might well be equal or substantially similar to a refund ordered under Section 204 of the Act,[69] this does not transform a private complaint action into a public enforcement proceeding subject to broad public interest considerations.

31. As in the *MCI Damages Order*, we find defendants' arguments with respect to "passing-on" equally unavailing. In rejecting this same argument, we said, "[w]hether [complainant] passed on the overcharges or absorbed them does not alter the fact that the defendants overcharged [complainant] in violation of a binding rate of return prescription and must answer for such violations."[70] The issue is not what complainants have done in response to paying excessive rates, but whether complainants have been damaged as a result of these excessive rates.[71]

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[61] *AT&T v. FCC*, 836 F.2d at 1392 ("Thus, as we previously have concluded, the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate of return prescription").

[62] Indeed, the court in *Ohio Bell* recognized the continuing efficacy of our rate of return framework. *See* 949 F.2d at 868.

[63] *MCI Liability Order*, 5 FCC Rcd at 223.

[64] *MCI Damages Order* at para. 26.

[65] In the *MCI Liability Order*, we held that the complainant therein could prove that defendants' rates were unjust and unreasonable by proving that the defendants violated our rate of return prescription. *See MCI Liability Order*, 5 FCC Rcd at 226.

[66] For a full discussion of the Commission's authority to prescribe and enforce carriers' rates of return, *see MCI Liability Order*, 5 FCC Rcd at 222-223.

[67] *MCI Damages Order* at para. 29.

[68] *Id.*

[69] *See Seaboard*, 442 U.S. 444, 455, n.8:

> If a shipper proves a rate is unreasonable and that he was damaged in the full amount he was overcharged, the outcome of a § 13(1) [§ 208] proceeding will be no different than that of a § 15(8)(a) [§ 204] proceeding in which the carrier fails to establish the reasonableness of the rate.

[70] *MCI Damages Order* at para. 31.

[71] While defendants have asserted that lower charges to complainant would have resulted in lower charges to complainant's customers, they have provided no persuasive

32. Nor can we accept the defendants' related claim that we should require complainants to flow through any damages it may receive to its end user customers. Sections 206-209 of the Act give private parties the right to file complaints challenging the acts or omissions of carriers and to recover monetary damages resulting from such acts or omissions. Complainants, however, are charged, as complainants are in the instant cases, with the burden of establishing violations of the Act or Commission rule or order and the amount or extent of damage suffered as a consequence of such violations. Accepting defendants' flow through argument would, in effect, transform complainants' complaints into class action suits on behalf of its customers, a result neither expressly contemplated by nor consistent with the private remedy created under Sections 206-209 of the Act.

33. In addition, we reject USWC's contention that damages awards to complainants are precluded because they would drive USWC's overall rate of return for USWC in the aggregate below the minimum necessary to raise capital to confiscatory levels. Assuming *arguendo*, that such an inquiry is relevant to a Section 208 damages claim, USWC has failed to provide sufficient record evidence for the Commission to assess the impact of any damages award upon its overall interstate rate of return. While USWC has provided some data in Exhibit A to its brief,[72] these data made no clear showing of the amount by which awards to complainants would reduce USWC's overall interstate earnings or rate of return let alone that any such reduction would be confiscatory. For the reasons stated in the *MCI Damages Order*,[73] we find USWC's other equitable arguments regarding the uncertainty surrounding tariff filings during the 1985-86 period and an alleged windfall to complainants should they receive damages awards equally unavailing.

34. We reject complainants' claims that the allowance of offsets would somehow repeal our rate return prescription on a category basis. The issue of damages to a particular complainant is separate and apart from the validity and effect of our rate of return prescription. The determination we make here is the extent to which complainants suffered damage on account of defendants' violations of the rate of return prescription. The question of offsets is relevant to that determination and no other.

35. Consistent with our discussion here, we award damages to complainants as set forth in Appendix A. In reaching the amounts specified in Appendix A, we have reviewed the damages calculations provided by both complainants and defendants and made adjustments to these calculations as explained in Appendix A. In addition, we accept the defendants' claims for offsets to the extent that the record shows that the complainants purchased access services from the defendants during the period in question at rates that produced earnings below the Commission's prescribed levels.

2. Interest on Damages

a. Contentions of the Parties

36. Defendants' final claim is that complainants are not entitled to prejudgment interest should the Commission award damages to complainants. Defendants ground this claim on their contention that the amount of damages has been sharply disputed in these proceedings.[74] Defendants claim that interest would penalize them even though they have not been accused of deliberate wrongdoing and interest is not necessary to make complainants whole.[75] Defendants also contend that while the Commission may award interest under Section 204 of the Act, there is no provision for the award of interest under Section 206 of the Act. Because we cannot lawfully grant complainants refunds, defendants argue, we may not award interest.[76]

37. Complainants dispute defendants' claims that they are not entitled to prejudgment interest at the IRS rate or the highest rate of the alternatives presented to the Commission in these proceedings in connection with any ultimate damages award. Complainants contend that an award of prejudgment interest is appropriate in the instant cases because it is typically awarded in overcharge cases under the Act in order to make the injured party whole[77] and to effectuate the purposes of the Section 208 complaint remedy.[78]

b. Discussion

38. The defendants' claim that the Commission lacks authority to award interest in a Section 208 common carrier complaint proceeding has no merit. Although Section 208 of the Communications Act does not explicitly authorize an award of interest, our authority under Sections 4(i) and other sections of the Act to award interest in a common carrier complaint case is well established.[79] In deciding whether to award interest in a particular common carrier complaint case we are generally guided by federal court practice, where the award of prejudgment interest "... is a matter left to the sound discretion of the trial court."[80] The award of interest in a common carrier complaint case is thus guided by considerations of fairness. Applying this criterion we believe that interest is appropriate in these cases. It is undisputed that defendants'

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evidence in support of this contention. Pacific Bell, for example, relies solely on press clippings that purportedly show that Telecom's rates to its customers would have been affected by changes in defendants' rates. Pacific Bell Br. at 19-20. These clippings do not, however, establish, as a matter of law, that complainant, in fact, passed on defendants' overcharges to its customers.

[72] Exhibit A contains a summary and compilation of information submitted in MTN's, NWB's, and PNB's Forms 492 for the relevant monitoring period, a calculation of how much money USWC would have earned if its entire carrier enterprise earned exactly at a 12.75% rate of return, and the same calculation at a 13.10% rate of return. *See also* MTN Br. at Exhibit A.

[73] *MCI Damages Order* at para. 32.

[74] *See, e.g.*, Pacific Bell Br. at 24; Bell Atlantic Br.1 at 14.

[75] *See, e.g.*, Ameritech Br.1 at 25-26; Bell Atlantic Br.1 at 12-13.

[76] *See, e.g.*, USWC Br. at 13; SWB Br. at 7; Bell Atlantic Br.1 at 12-13.

[77] *See, e.g.*, CompTel Br.2 at 12.

[78] *See, e.g.*, ATC Br. File Nos. E-90-353--354 at 27.

[79] *See* MCI Telecommunications Corporation v. American Telephone and Telegraph Company, *et al.*, 94 FCC 2d 332, 343-46 (1983).

[80] *United States v. California Board of Equalization*, 650 F.2d 1127, 1132 (9th Cir. 1981), *aff'd*, 456 U.S. 901 (1982), *reh'g denied*, 456 U.S. 985 (1982).

earning levels were readily ascertainable at the time the complaints were filed, as was the extent to which those earnings exceeded the Commission's prescribed level. During the pendency of the complaint proceedings, complainants have been effectively deprived of the use of the amounts they paid that are attributable to defendants' unlawful rates. Interest is required to effect a full and fair remedy for complainants, who paid rates higher than they would have paid had defendants' earned within the prescribed levels. We find that interest should be computed at the IRS rate for tax refunds[81] and should accrue from January 1, 1987, the day after which the 1985-1986 monitoring period ended. At that point, defendants were subject to the earnings limitations of a new monitoring period. Accordingly, we award interest calculated at the IRS rate for tax refunds[82] as set forth in Appendix B on the damages awarded here to CompTel and ATC from January 1, 1987 until the date of full payment.

IV. CONCLUSION

39. We have carefully reviewed the extensive record before us and have found, to the extent indicated here, that the CompTel complainants are entitled to an award of damages, plus accumulated interest on such damages, as set forth in Appendices A and B for the defendants' violations of our rate of return prescription for the 1985-1986 monitoring period and that ATC is entitled to an award of damages, plus accumulated interest on such damages, as set forth in Appendices A and B for defendants' violations of our rate of return prescription for the 1985-1986 monitoring period.

V. ORDERING CLAUSES

40. Accordingly, IT IS ORDERED, pursuant to Section 4(i), 4(j), 201, 206, 207, 208 and 209 of the Communications Act, as amended, 47 U.S.C. §§ 4(i), 4(j), 201, 206, 207, 208 and 209, that the above-captioned complaints filed by Advanced Telecommunications Corporation and Competitive Telecommunications Association ARE GRANTED to the extent discussed above and otherwise ARE DENIED.

41. IT IS FURTHER ORDERED that defendants SHALL PAY to the CompTel complainants the damages as set forth in Appendix A within 60 days after the release date of this Memorandum Opinion and Order; and that defendants SHALL PAY to Advanced Telecommunications Corporation and its subsidiaries the damages as set forth in Appendix A within 60 days after the release date of this Memorandum Opinion and Order.

42. IT IS FURTHER ORDERED that defendants SHALL PAY to the CompTel complainants interest on the damages awarded here at the IRS rates set forth in Appendix B from January 1, 1987 until the date full payment is made; and that defendants SHALL PAY to Advanced Telecommunications Corporation and its subsidiaries interest on the damages awarded here at the IRS rates set forth in Appendix B from January 1, 1987 until the date full payment is made.

43. IT IS FURTHER ORDERED that the Motions for Leave to File Out of Time filed by CompTel on November 19, 1990 ARE GRANTED; that the Motion to Accept Late Filed Opposition to Defendant's Supplement to Motion to Dismiss filed by ATC on February 27, 1992 IS GRANTED; that the Motion for Leave to File Out of Time filed by C&P and NJB on July 21, 1992 IS GRANTED; that the Motion of Defendant to Supplement Brief filed by SWB on August 24, 1992 IS GRANTED; that the Motions to Supplement Record filed by CompTel on October 23, 1992 ARE GRANTED.

44. IT IS FURTHER ORDERED that the Supplement to Motion to Dismiss filed by USWC on February 13, 1992 IS ACCEPTED FOR FILING; and that the Supplement to Motion to Dismiss filed by MTN on February 13, 1992 IS ACCEPTED FOR FILING.

45. IT IS FURTHER ORDERED that the Motions to Strike filed on July 24, 1990 by ATC ARE DENIED; that the Motion to Serve Request for Production of Documents filed by Michigan Bell and Wisconsin Bell on June 19, 1992 IS DENIED; that the Motion to Serve Request for Production of Documents filed by Michigan Bell and Wisconsin Bell on June 29, 1992 IS DENIED; that the Motion to Compel Response to Interrogatories filed by Michigan Bell and Wisconsin Bell on July 24, 1992 IS DENIED; that the Motion to Compel Responses to Interrogatories filed by ATC on July 29, 1992 IS DENIED; and that the Request to Propound Additional Interrogatories filed by Michigan Bell and Wisconsin Bell on November 5, 1992 IS DENIED.

46. IT IS FURTHER ORDERED that the cross-complaints filed by USWC on November 6, 1989 ARE DISMISSED; that the Motion to Dismiss filed by C&P and NJB on November 6, 1989 IS DISMISSED; that the Motion to Dismiss filed by Michigan Bell on November 6, 1989 IS DISMISSED; that the Motion to Dismiss filed by Wisconsin Bell on November 6, 1989 IS DISMISSED; that the Joint Motion to Dismiss filed by MTN, NWB, and PNB on November 6, 1989 IS DISMISSED; that the Motion to Dismiss filed by SWB on November 6, 1989 IS DISMISSED; that the Motion to Dismiss filed by C&P on July 9, 1990 IS DISMISSED; that the Motion to Dismiss filed by NJB on July 9, 1990 IS

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[81] We believe that the rationale adopted by the Commission for applying the IRS rate in pole attachment complaint proceedings under Section 204 of the Act, 47 U.S.C. § 204, is equally applicable here. In Teleprompter of Fairmont v. C&P of West Virginia, 79 FCC 2d 232 (1980), the Commission stated

> As a matter of fairness, we believe that the rate of interest applied in a pole attachment complaint proceeding should be readily available, easily applied, and periodically revised to reflect changes in borrowing costs. In light of these considerations, we find the interest rate for federal tax refunds and additional tax payments suitable for use in this type of proceeding. This rate appears in a variety of easily obtained official and commercial publications, and is revised on a regular basis. [footnote omitted.]

79 FCC 2d at 238.

[82] The applicable IRS rates are set forth in Appendix B.

DISMISSED; that the Motion to Dismiss filed by Michigan Bell on July 9, 1990 IS DISMISSED; that the Motion to Dismiss filed by Wisconsin Bell on July 9, 1990 IS DISMISSED; that the Motion to Dismiss filed by MTN on July 20, 1990 IS DISMISSED; that the Motion filed by Michigan Bell on October 11, 1990 IS DISMISSED; that the Motion filed by Wisconsin Bell on October 11, 1990 IS DISMISSED; that the Motion filed by Michigan Bell on October 12, 1990 IS DISMISSED; and that the Motion filed by Wisconsin Bell on October 12, 1990 IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

BELL ATLANTIC

Chesapeake and Potomac Telephone Companies (C&P)

[all amounts in dollars($)]

CompTel File No. E-89-382	DAMAGES (1)	OFFSETS (5)	NET
American Sharecom	26	0	26
American Telco	13 (2)	0	13
Cable & Wireless	10,161	161,000	0
Eastern Tel	35	0	35
ITT (8)	8,614	0 (6)	8,614
Litel	53	0	0
Metromedia(8)	978	52,000	0
RCI	310	5,000	0
Telecom Svcs	4	0	4
Telus (3)	332	3,000	0
TotalTel (4)	1,477	0 (6)	1,477
TelAmerica of S.L.	20	0	20

ATC File No. E-90-353	DAMAGES (9)	OFFSETS (10)	NET
	98	899	0

New Jersey Bell (NJB)

[all amounts in dollars($)]

CompTel File No. E-89-383	DAMAGES (1,7)	OFFSETS (5)	NET
American Sharecom	111	0	111
American Telco	79	0 (6)	79
Cable & Wireless	47,984	42,000	5,984
Eastern Tel	2,137	3,000	0
ITT (8)	123,250	0 (6)	123,250
Metromedia (8)	53,220	68,000	0
RCI	10,041	11,000	0
Telecom Svcs.	47	0	47
Telus (3)	4,770	6,000	0
TotalTel (4)	16,900	0 (6)	16,900

ATC File No. E-90-354	DAMAGES (9)	OFFSETS (10)	NET
	234	293	0

NOTES RELATING TO BELL ATLANTIC

1. CompTel used the 1987-1988 monitoring period target rate of return plus buffer of 12.4% in computing damages. We note that the target plus buffer for the 1985-1986 monitoring period at issue in this proceeding is 13.25%. We have recalculated CompTel's claimed damages accordingly. Although Bell Atlantic also calculated CompTel's damages, as well as claimed offsets for underearnings, we accept CompTel's calculation of damages, as corrected. Bell Atlantic rounded to thousands in its calculations. We note that several small amounts were rounded to zero. We find CompTel's corrected amounts to be more precise.

2. CompTel failed to calculate a damages amount for American Telco. It provided the dollar amount of purchases by American Telco, however, in the column marked "Damages to Complainant Excluding Interest". *See* CompTel Br. and RBr. at Appendix. We calculated damages for American Telco using the purchases amount and CompTel's damages calculation methodology. The information supplied by Bell Atlantic corroborates the purchases amount. *See* Bell Atlantic Response to Interrogatories at Attachment 1, page 3.

3. Telus is also a complainant against C&P and NJB for the same monitoring period in File Nos. E-90-353-354. Advanced Telecommunications Corporation, the parent of Telus, has revised its damages calculations in File Nos. E-90-353-354 to delete the claims of Telus. *See* Statement in Clarification, filed September 28, 1992 in File Nos. E-90-353-354. Therefore, we will include the claims of Telus against C&P and NJB in the instant proceedings.

4. Bell Atlantic denies that TotalTel took service in the relevant monitoring period. Bell Atlantic Br. at 2. However, CompTel provides the billing account numbers under which it claims TotalTel took service from C&P and NJB. *See* CompTel RBr. at Appendix. Bell Atlantic does not deny the accuracy of the account numbers, although it could have done so in a supplemental pleading. We therefore accept CompTel's contention that TotalTel took service in the amounts claimed.

5. We accept Bell Atlantic's calculations of offsets. CompTel provides no offsets calculations and did not object to Bell Atlantic's calculations of amounts it claims should be offset.

6. Defendant provides no offsets calculation in the relevant proceeding regarding this complainant.

7. CompTel claims damages from NJB in the special access and switched traffic sensitive categories. However, CompTel's claims are premised on 12.4% being the target rate of return plus buffer in the 1985-1986 monitoring period. The correct target rate of return plus buffer for this monitoring period is 13.25%. NJB earned 12.53% percent in the special access category during the relevant monitoring period. Therefore, NJB did not overearn in the

special access category and CompTel's claims for damages as a result of NJB's earnings in the special access category are without merit. We note that Bell Atlantic correctly claims offsets with regard to some of the complainants for underearnings in the special access category. We do not include the amounts CompTel claims as damages relating to the special access category in the damages claims listed in the above chart.

8. CompTel filed a Motion to Supplement the Record with an affidavit by an officer of this complainant company. In the affidavit, the officer attests to the accuracy of the amount of purchases listed in CompTel's briefs based on the complainant company's records. Bell Atlantic did not oppose the motion. We will grant the CompTel's motion to supplement the record and will accept the offered affidavits.

9. Which of ATC's subsidiaries are properly included in the proceedings relating to Bell Atlantic has been sharply disputed. Bell Atlantic objects to the inclusion of all the subsidiaries for which ATC makes claims in its brief on the grounds that it had no notice of those subsidiaries until various late stages of the pleading cycle. Further, Bell Atlantic objects to the inclusion of certain subsidiaries in this proceeding which are also complainants against Bell Atlantic in other proceedings in which damages for Bell Atlantic's overearnings in the 1985-1986 monitoring period are at issue. *See, e.g.*, Bell Atlantic RBr. at 2.

As an initial response, ATC offered to credit damages awarded for claims brought by its subsidiaries in other proceedings against damages awarded in this proceeding. ATC Br. at 29, note 70. Bell Atlantic objected to this solution. Bell Atlantic RBr. at 2. On September 28, 1992 ATC filed a Statement in Clarification in which it stated that all claims by its subsidiary Telus Communications, Inc. (Telus) would be considered in the CompTel proceedings, File Nos. E-89-382-383. Further, ATC recalculated damages using the purchases information provided by Bell Atlantic. In so doing, ATC stated that it assumed that the purchases information provided by Bell Atlantic included all purchases, of which Bell Atlantic has a record, under all the ACNA codes that ATC had identified in the relevant proceedings. ATC reserved the right to file a supplemental damages calculation if Bell Atlantic possesses records of additional purchases amounts under the ACNA codes identified by ATC. *See* ATC Statement in Clarification at 1-2 and Attachment A.

We accept ATC's damages calculations included in the Attachments to its Statement in Clarification filed on September 28, 1992. We note that ATC has not filed any supplemental calculations and that Bell Atlantic has not objected to ATC's revised calculations. We note further that these calculations do not include claims for Telus. We have considered Telus' claims in the CompTel proceedings identified above.

10. Bell Atlantic's computations of claimed offsets includes information relating to Telus. We have recalculated these offsets excluding information relating to Telus.

AMERITECH

Michigan Bell

[all amounts in dollars($)]

	DAMAGES (1)	OFFSETS (2)	NET
CompTel File No. E-89-384			
ITT (3)	3,781	1,075	2,706
RCI	164	0	164
Telecom Svcs.	12	173	0
	DAMAGES (4)	**OFFSETS (5)**	**NET**
ATC File No. E-90-355	11	0	11

Wisconsin Bell

[all amounts in dollars($)]

	DAMAGES (1)	OFFSETS (2)	NET
CompTel File No. E-89-385			
American Sharecom	13,971	3,426	10,545
ITT (3)	50,389	12,122	38,267
Telecom Svcs.	20,241	4,747	15,494
Telus	1,870	432	1,438
Tel. Assoc's. L.D.	2,076	230	1,846
	DAMAGES (4)	**OFFSETS (5)**	**NET**
ATC File No. E-90-356	21,404	15,564	5,840

NOTES RELATING TO AMERITECH

1. We accept CompTel's calculations of damages prior to offsets. Although Ameritech also calculated CompTel's damages, Ameritech rounded to thousands in its calculations. We note that several small amounts were rounded to zero. We find CompTel's calculations to be more precise.

2. Ameritech submitted attachments to its brief which show its calculations of the amounts its category-specific earnings deviate from the target rate of return plus buffer of 13.25%. However, a carrier can not be said to have underearned to the extent that it earned more than the target rate of return. Therefore, we find that Michigan Bell, with a rate of return of 12.85%, did not underearn in the common line category. We have recalculated, based on the 12.75% target rate of return, Michigan Bell's underearnings in the special access category allocable to each complainant and Wisconsin Bell's underearnings in the common line and special access categories allocable to each complainant.

3. CompTel filed a Motion to Supplement the Record with an affidavit by an officer of this complainant company. In the affidavit, the officer attests to the accuracy of the amount of purchases listed in CompTel's briefs based on the complainant company's records. Michigan Bell and Wisconsin Bell oppose the motion on the grounds that the offered affidavit is not probative of any issue in these proceedings. We will grant the CompTel's motion to

supplement the record and will accept the offered affidavits. Michigan Bell and Wisconsin Bell have not persuaded us that the affidavits are not probative. Although these defendants dispute the amount of this complainant's purchases, they have offered no affidavits in rebuttal or other evidence which call into question the veracity of the offered affidavits.

4. The parties have sharply disputed the inclusion of certain ATC subsidiaries in the damages proceedings relating to Ameritech. Ameritech objects to the inclusion of all the subsidiaries for which ATC makes claims in its brief on the grounds that it had no notice of those subsidiaries until late stages of the pleading cycle. Further, Ameritech objects to the inclusion of certain subsidiaries in this proceeding which are also complainants against Ameritech in other proceedings in which damages for Ameritech's overearnings in the 1985-1986 monitoring period are at issue. *See, e.g.,* Further Statement in Clarification filed by Ameritech on October 23, 1992 (Further Statement).

On September 28, 1992, ATC filed a Statement in Clarification in which it states that all claims by its subsidiary Telus Communications, Inc. (Telus) would be considered in the CompTel proceedings, File Nos. E-89-384-385. Further, ATC recalculates damages using the purchases data provided by Ameritech. In so doing, ATC states that it assumes that the purchases information provided by Ameritech included all purchases under all the ACNA codes that ATC had identified in the relevant proceedings. ATC reserves the right to file a supplemental damages calculation if Ameritech possesses records of additional purchases amounts under the ACNA codes identified by ATC. *See* ATC Statement in Clarification.

We accept ATC's damages calculations included in the Attachments to its Statement in Clarification filed on September 28, 1992. We note that these calculations do not include claims for Telus. We have considered Telus' claims in the CompTel proceedings identified above. We note further that while Ameritech does not challenge ATC's revised calculations, it reiterates its position that the claims of Telecommunication Services Corp. (TSC) are also included in the CompTel complaints. *See* Further Statement at p.2. We agree with Ameritech that ATC has included TSC's claims in both the CompTel and ATC proceedings. Since we have disposed of TSC's claims in the CompTel proceedings, we will offset any damages awarded in the CompTel proceedings against damages awarded in the ATC proceedings to ensure that TSC receives damages in only one proceeding for the 1985-1986 monitoring period. ATC has not challenged Ameritech's assertion that TSC's claims have been included in the CompTel proceedings.

5. Ameritech submitted attachments to its brief which show its calculations of the amounts its category-specific earnings deviate from the target rate of return plus buffer of 13.25%. However, a carrier can not be said to have underearned to the extent that it earned more than the target rate of return of 12.75. Therefore, we have recalculated, based on the 12.75% target rate of return, Wisconsin Bell's underearnings in the common line access category allocable to ATC. We have also offset the damages awarded to TSC from Wisconsin Bell in the CompTel proceeding, File No. E-89-385.

US WEST COMMUNICATIONS (USWC)

Mountain States (MTN)

[all amounts in dollars($)]

	DAMAGES (1)	OFFSETS (2)	NET
CompTel File No. E-89-386			
Am. Sharecom	11,842	15,216	0
ITT Comm. Svcs.	30,865	2,173	28,692
KLP	2,871	0	2,871
Tel-America (3)	125,434	0	125,434
Wylon	31,909	0	31,109

	DAMAGES (4)	OFFSETS (5)	NET
ATC File No. E-90-361	6,091	179	5,912

Northwestern Bell (NWB)

[all amounts in dollars($)]

	DAMAGES (1)	OFFSETS (2)	NET
CompTel File No. E-89-387			
Am. Sharecom	1,656	658	998
ITT Comm. Svcs.	12,803	94	12,709
Litel	33	0	33
Tel-America (3)	167	0	167
Telecomm. Svcs.	43	0	43
Telephone Assoc's. L.D.	1,195	0	1,195
Wylon	206	0	206

Pacific Northwest Bell (PNB)

[all amounts in dollars($)]

	DAMAGES (1)	OFFSETS (2)	NET
CompTel File No. E-89-388			
Am. Sharecom	7,339	2,102	5,237
ITT Comm. Svcs.	248,305	300	248,005
Litel (1)	0	0	0
Tel-America (3)	2,803	0	2,803

NOTES RELATING TO USWC

1. USWC objects to CompTel's calculations because CompTel failed to include Intercept and Information element information in its switched traffic sensitive category calculations, erroneously submitted a claim for damages in the switched traffic sensitive category in Oregon, and failed to account for states in which USWC earned less than the maximum allowed rate of return. USWC RBr. at Attachments.

We will not adjust the amounts shown on the USWC's Forms 492 by the amounts for Intercept and Information. The Forms 492 are final reports and the time to amend or correct them has passed. We have held that carriers are entitled to rely on the final Forms 492. *See MCI Liability Order*, 5 FCC Rcd at 225, para. 78. We will disallow Litel's

switched traffic sensitive claim in Oregon on the basis that complainant has not proven damages. We note that in this and parallel proceedings, complainant has submitted affidavits in support of its claimed purchases where a defendant has disputed claimed purchases. Complainant has filed no such affidavit on behalf of Litel in this proceeding. We address USWC's contention regarding states where USWC underearned in Note 2. Subject to the above, we accept CompTel's calculations of damages.

2. USWC claims offsets for category underearnings in states where complainants took service, but where US West companies had no overearnings. We believe it is reasonable to allow such offsets. When complainants took service in an underearning category in a state, they received the benefit of defendants' rates that produced underearnings regardless of whether defendant overearned in another category in that state. USWC, however, calculated the amount of offsets using the target rate of return plus buffer of 13.25%. Because a carrier can not be said to have underearned to the extent it exceeded the target rate of return, we recalculate USWC's claimed offsets using the 12.75% target rate of return. Furthermore, we find that PNB, with a 13.01% rate of return, did not underearn in the special access category in Washington and no offsets are indicated.

3. CompTel filed a Motion to Supplement the Record with an affidavit by an officer of this complainant company. In the affidavit, the officer attests to the accuracy of the amount of purchases listed in CompTel's briefs based on the complainant company's records. USWC did not oppose the motion. We will grant the CompTel's motion to supplement the record and will accept the offered affidavits.

4. USWC objects to ATC's calculations because ATC failed to include Intercept and Information element information in its switched traffic sensitive category calculations and failed to account for states in which USWC earned less than the maximum allowed rate of return. USWC RBr. at Attachments.

We will not adjust the amounts shown on the USWC's Forms 492 by the amounts for Intercept and Information. The Forms 492 are final reports and the time to amend or correct them has passed. We have held that carriers are entitled to rely on the final Forms 492. *See MCI Liability Order*, 5 FCC Rcd at 225, para. 78. We address USWC's contention regarding states where USWC underearned in Note 5.

On September 28, 1992, ATC filed a Statement in Clarification in which it stated that all claims by its subsidiary Telus Communications, Inc. (Telus) would be considered in the CompTel proceeding, File Nos. E-89-361. Further, ATC recalculated damages using the purchases data provided by USWC. In so doing, ATC states that it assumed that the purchases information provided by USWC included all purchases under all the ACNA codes that ATC had identified in the relevant proceedings. ATC reserves the right to file a supplemental damages calculation if USWC possesses records of additional purchases amounts under the ACNA codes identified by ATC. *See* ATC Statement in Clarification.

We accept ATC's damages calculations included in the Attachments to its Statement in Clarification filed on September 28, 1992. We note that these calculations do not include claims for Telus. We have considered Telus' claims in the CompTel proceeding identified above. We note further that USWC does not challenge ATC's revised calculations.

5. USWC claims offsets for category underearnings in states where complainants took service, but where USWC had no overearnings. We believe it is reasonable to allow such offsets. When complainant took service in an underearning category in a state, it received the benefit of defendant's rates that produced underearnings regardless of whether defendant overearned in another category in that state. USWC, however, calculated the amount of offsets using the target rate of return plus buffer of 13.25%. Because a carrier can not be said to have underearned to the extent it exceeded the target rate of return, we recalculate USWC's claimed offsets using the 12.75% target rate of return for the switched traffic sensitive category in Colorado.

PACIFIC BELL
[all amounts in dollars($)]

	DAMAGES (1)	OFFSETS (2)	NET
CompTel File No. E-89-389			
ITT Comm. Svcs. (3)	36,452	84,040	0
Telus	6,133	2,705	3,428
Global Telenet	3,157	1,393	1,764
Execuline of Sacramento	28,479	3,740	4,739
Cable & Wireless (4)	47,380	20,900	26,480
Tel-Am. of S.L. (6)1	10,638	4,693	5,945
American Sharecom (5)	2,561	1,130	1,431
Call America Riverside	2,068	912	1,156
Call America Palm Desert	1,199	529	670
American Telco	100	44	56
Wylon	161	71	90
Am. Comm. Enterprises	12,652	5,581	7,071
Metromedia (3)	9,901	4,367	5,534
Call Am. Bus. Comm.	117	52	65
Express Tel (3)	78,986	34,842	44,144

NOTES RELATING TO PACIFIC BELL

1. We accept CompTel's calculations of damages prior to offsets. Although Pacific Bell also calculated CompTel's damages, Pacific Bell rounded to thousands in its calculations. Additionally, Pacific Bell did not calculate damages for each complainant. Pacific Bell's calculations are on an aggregate basis. We find CompTel's calculations to be more precise.

2. Pacific Bell submitted an attachment to its brief in which it shows its calculation of an offset for underearnings in the common line category and an offset for a refund already given to complainants for overcharges in the 1985-1986 monitoring period. The calculations are in the aggregate and are not broken down by complainant.

We find that the damages claimed by CompTel should be offset by the amounts claimed by Pacific Bell. Lacking specific information on how the aggregate offset amount should be divided among the complainants, we apply offsets to each complainant in the proportion of a particular complainant's purchases to the purchases made by all the complainants in this proceeding.

3. CompTel filed a Motion to Supplement the Record with an affidavit by an officer of this complainant company. In the affidavit, the officer attests to the accuracy of the amount of purchases listed in CompTel's briefs based on the complainant company's records. Pacific Bell does not object to the admission of the affidavits. We will grant the CompTel's motion to supplement the record and will accept the offered affidavits.

4. We corrected a mathematical error in CompTel's calculation for this complainant.

5. Pacific Bell argues that the claims of American Sharecom should not be considered in this proceeding because it filed an individual complaint in File No. E-91-132. We note that File No. E-91-132 relates to the 1987-1988 monitoring period which is not at issue here. The claims American Sharecom makes in the instant proceeding are for the 1985-1986 monitoring period. We will consider American Sharecom's 1985-1986 claims here.

6. As discussed in Note 3, *supra*, Pacific Bell disputes the purchases amounts certain complainants have used in calculating damages. CompTel submitted affidavits in which officers for some of the complainants attest to the accuracy of the purchase amounts stated in CompTel's brief. We have accepted the disputed purchases amounts submitted by CompTel where those amounts were supported by an affidavit. However, no affidavit was filed for Tel-America of Salt Lake. Therefore, we accept the lower purchases amount admitted by the defendant and recalculate CompTel's damages claim accordingly. We note that CompTel initially used the purchases amount advocated by Pacific Bell to calculate damages, but filed an erratum on October 8, 1992 using a larger amount.

SOUTHWESTERN BELL

[all amounts in dollars($)]

CompTel File No. E-89-390	DAMAGES (1)	OFFSETS (2)	NET
Aerofone	1,594	0	1,594
Dscnt. Comm.	1,159	0	1,159
Telecom. Svcs.	311	0	311

NOTES RELATING TO SOUTHWESTERN BELL

1. We accept CompTel's calculations of damages. SWB provided no calculation of its own and did not object to CompTel's calculations.

2. SWB provided no calculation of offsets for underearnings or any other mitigating factor. Furthermore, SWB did not argue that offsets should be given for underearnings. Rather, SWB argued that offsets are insufficient and recoupment of all underearnings is necessary. *See* SWB Br. at 6.

APPENDIX B

Effective Period	Rate	Internal Revenue Service Citation
01/01/87 - 03/31/87	8%	Rev.Rul. 146, 1986-2 C.B. 208
04/01/87 - 06/30/87	8%	Rev.Rul. 87-23, 1987-13 I.R.B. 46
07/01/87 - 09/30/87	8%	Rev.Rul. 87-62, 1987-29 I.R.B. 10
10/01/87 - 12/31/87	9%	Rev.Rul. 87-87, 1987-36 I.R.B. 8
01/01/88 - 03/31/88	10%	Rev.Rul. 87-131, 1987-50 I.R.B. 6
04/01/88 - 06/30/88	9%	Rev.Rul. 88-17, 1988-10 I.R.B. 6
07/01/88 - 09/30/88	9%	Rev.Rul. 88-50, 1988-25 I.R.B. 39
10/01/88 - 12/31/88	10%	Rev.Rul. 88-86, 1988-41 I.R.B. 1
01/01/89 - 03/31/89	10%	Rev.Rul. 88-105, 1988-51 I.R.B. 4
04/01/89 - 06/30/89	11%	Rev.Rul. 89-36, 1989-1 C.B. 309
07/01/89 - 09/30/89	11%	Rev.Rul. 89-69, 1989-1 C.B. 310
10/01/89 - 12/31/89	10%	Rev.Rul. 89-99, 1989-2 C.B. 256
01/01/90 - 03/31/90	10%	Rev.Rul. 89-125, 1989-2 C.B. 257
04/01/90 - 06/30/90	10%	Rev.Rul. 90-19, 1990-1 C.B. 186
07/01/90 - 09/30/90	10%	Rev.Rul. 90-47, 1990-1 C.B. 187
10/01/90 - 12/31/90	10%	Rev.Rul. 90-71, 1990-35 I.R.B. 4
01/01/91 - 03/31/91	10%	Rev.Rul. 90-94, 1990-46 I.R.B. 16
04/01/91 - 06/30/91	9%	Rev.Rul. 91-20, 1991-11 I.R.B. 1
07/01/91 - 09/30/91	9%	Rev.Rul. 91-33, 1991-21 I.R.B. 1
10/01/91 - 12/31/91	9%	Rev.Rul. 91-50, 1991-37 I.R.B. 1
01/01/92 - 03/31/92	8%	Rev.Rul. 91-65, 1991-51 I.R.B. 1
04/01/92 - 06/30/92	7%	Rev.Rul. 92-21, 1992-14 I.R.B. 14
07/01/92 - 09/30/92	7%	Rev.Rul. 92-44, 1992-24 I.R.B. 86
10/01/92 - 12/31/92	6%	Rev.Rul. 92-77, 1992-38 I.R.B. 12

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELECOM*USA, INC.,
AND ITS SUBSIDIARIES,
Complainant,

v.

PACIFIC BELL TELEPHONE COMPANY,	File No. E-90-346
MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-362
PACIFIC NORTHWEST BELL TELEPHONE, COMPANY, and	File No. E-90-363
NORTHWESTERN BELL TELEPHONE COMPANY,	File No. E-90-364

Defendants.

MEMORANDUM OPINION AND ORDER

Adopted: January 29, 1993; Released: February 26, 1993

By the Commission:

TABLE OF CONTENTS

Topic	Paragraph No.
I. INTRODUCTION	1
II. BACKGROUND	2 - 4
III. DISCUSSION	5 - 46
A. Liability for Damages	5 - 16
1. Contentions of the Parties	5 - 11
2. Discussion	12 - 16
B. Damages and Interest Claims	17 - 46
1. Damages	18 - 43
a. Contentions of the Parties	18 - 28
b. Discussion	29 - 43
2. Interest on Damages	44 - 46
a. Contentions of the Parties	44 - 45
b. Discussion	46
IV. CONCLUSION	47
V. ORDERING CLAUSES	48 - 53

I. INTRODUCTION

1. In this Memorandum Opinion and Order we find that Telecom*USA, Inc. (Telecom) has met its burden of establishing that defendant local exchange carriers (LECs) have violated Section 201(b) of the Communications Act by earning in excess of the rate of return prescribed by the Commission for the period October 1, 1985 through December 31, 1986. In addition, we award Telecom damages and interest for defendants' rate of return violations.

II. BACKGROUND

2. The Commission has previously held that LECs who had earned in excess of the prescribed rate of return for October 1, 1985 through December 31, 1986 violated Section 201(b) of the Communications Act (the "Act").[1] These decisions firmly establish that carrier rates producing earnings in excess of the Commission's prescribed rate of return violate Section 201(b) of the Act[2] and allegations of such overearnings are sufficient to sustain a cause of action under Section 208 of the Act.[3] Furthermore, the Commission has held that complainants may recover damages, including interest, from LECs who violated the Commission's rate of return prescription.[4]

3. While a detailed accounting of the applicable statutory scheme and relevant Commission and court decisions that preceded the filing of the captioned complaints is set forth in the *MCI Liability Order* [5] and will not be repeated here, a very brief review of the relevant rate of return prescription is helpful. The Commission prescribed a rate of return of 12.75 percent for the initial monitoring period of October 1, 1985 through December 31, 1986.[6] Because the initial review period would be only 15 months rather than the two years of subsequent review periods, the

[1] MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co., *et al.*, 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon. denied*, 5 FCC Rcd 3463 (1990) (*MCI Reconsideration Order*) (jointly "*MCI Orders*"), *appeal dismissed sub nom. Mountain States Tel. and Tel. Co., et al. v. FCC*, 951 F.2d 1259 (10th Cir. 1991) (per curiam); and American Telephone and Telegraph Co. v. Northwestern Bell Telephone Co., 5 FCC Rcd 143 (1990), *appeal dismissed sub nom. Mountain States Tel. and Tel. Co., et al. v. FCC*, 951 F.2d 1259 (10th Cir. 1991) (per curiam).

[2] 47 U.S.C. § 201(b). This Section provides, in pertinent part, that "[a]ll charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful."

[3] 47 U.S.C. § 208.

[4] MCI Telecommunications Corporation v. Pacific Bell Telephone Company, *et al.*, FCC 93-70 (released February 8, 1993) (*MCI Damages Order*).

[5] *MCI Liability Order*, 5 FCC Rcd at 217-218.

[6] *See* Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985) (*Phase I Order*), *on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,103 (Apr. 1, 1986) (*Phase I Reconsideration*), *on further reconsideration*, 2 FCC Rcd 190 (1987). *See also* Procedures and Methodologies to Establish Reporting Requirements, CC Docket No. 86-127, FCC 86-514 (released Dec. 3, 1986), 52 Fed. Reg. 273 (Jan. 5, 1987).

Commission expanded the "buffer"[7] that would be used during this initial monitoring period to determine whether the prescription had been violated.[8] Carriers were given notice that a 13.10 percent level of earnings would be the maximum allowable rate of return on overall interstate earnings and 13.25 percent would be the maximum allowable return for any access service category.[9]

4. In May and June 1990, Telecom filed nine formal complaints[10] against the LECs alleging violation of the Commission's rate of return prescription.[11] In addition, Telecom reserved the right to file supplemental complaints for damages as provided for in Section 1.722 of the Commission's rules[12] because it could not determine the precise amount of damages it suffered at the time its complaints were filed. The defendants all filed answers; USWC filed a joint motion to dismiss.[13] On June 8 and 17, 1992, the Common Carrier Bureau (Bureau) released orders establishing discovery and briefing schedules.[14] Pursuant to the *Discovery Orders*, the parties submitted their initial briefs and reply briefs setting forth their respective claims and arguments.[15]

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[7] *See MCI Liability Order*, 5 FCC Rcd at 217:

> ... the Commission established both an authorized rate of return and a 'spread' or 'buffer' above that return for use in proceedings relating to the enforcement of the prescription. In other words, the authorized return would be employed in computing tariff rates; the spread, or buffer, would be used in combination with the authorized return 'to determine whether a rate of return prescription had been violated.' [footnote omitted].

[8] *Phase I Order*, 50 Fed. Reg. at 41,352 (para. 21).

[9] 47 C.F.R. § 65.701(b).

[10] Five of the complaints have since been settled with the LECs involved. *See* Telecom*USA, Inc. v. Southwestern Bell Telephone Company, 7 FCC Rcd 6544 (Com.Car.Bur. 1992); Telecom*USA, Inc. v. The Chesapeake and Potomac Telephone Companies and New Jersey Bell Telephone Company, 7 FCC Rcd 3403 (Com.Car.Bur. 1992); and Telecom*USA, Inc. v. Michigan Bell Telephone Company and Wisconsin Bell Telephone Company, 6 FCC Rcd 1405 (Com.Car.Bur. 1991).

Due to the similarity of the issues and arguments raised by the remaining parties, the complaints have been consolidated for disposition. These complaints were held in abeyance by the Commission pending resolution of a court remand in *Illinois Bell Tel. Co. v. FCC*, 911 F.2d 776 (D.C. Cir. 1990). *See* Telecom*USA, Inc. v. Pacific Bell Telephone Company, *et al.*, 6 FCC Rcd 664 (Com.Car.Bur. 1991). The Commission acted on the remand in October 1991. *See* Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, Decision on Remand, CC Docket No. 86-497, 7 FCC Rcd 296 (1991), *appeal docketed sub nom. Illinois Bell Telephone Co., et al. v. FCC*, No. 90-1020 (D.C. Cir. Jan. 11, 1991). On January 13, 1991, the Bureau released an order that reactivated the instant cases. *See* Order, 7 FCC Rcd 402 (Com.Car.Bur. 1992).

Telecom initially filed informal complaints against the defendants pursuant to Sections 1.716 *et seq.* of the Commission's rules, 47 C.F.R. §§ 1.716 *et seq.* Telecom states that (1) the captioned formal complaints were filed within six months of the defendants' reports in response to the informal complaints, (2) make references to the filing dates of the informal complaints, and (3) are based on the same cause of action as the informal complaints. *See* Telecom's Complaint, File No. E-90-346, at 2; Telecom's Complaint, File No. E-90-362, at 2; Telecom's Complaint, File No. E-90-363, at 2; Telecom's Complaint, File No. E-90-364, at 2. Accordingly, the captioned complaints relate back to the filing date of the informal complaints pursuant to Section 1.718 of the Commission's rules, 47 C.F.R. § 1.718. We note that defendants have not challenged the relation back of the formal to the informal complaints.

[11] The remaining defendants are Pacific Bell Telephone Company (Pacific Bell); and Mountain States Telephone and Telegraph Company (MTN), Northwestern Bell Telephone Company (NWB) and Pacific Northwest Bell Telephone Company (PNB) (collectively "USWC").

[12] 47 C.F.R. § 1.722.

[13] USWC filed its joint Motion to Dismiss on July 20, 1990. Telecom filed its opposition to the Motion to Dismiss on August 2, 1990. On February 13, 1992, USWC filed a supplement to its motion to dismiss (USWC Supplement). Telecom filed an opposition on February 26, 1992 and USWC replied on March 6, 1992. We will accept the USWC Supplement for filing since Telecom has had opportunity to respond.

On July 24, 1990, Telecom filed a Motion to Strike Pacific Bell's answer for failure to distinguish opposing authority pursuant to Section 1.720(d) and (e) of the Commission's rules, 47 C.F.R. § 1.720(d) and (e). Pacific Bell opposed the Motion to Strike arguing that it had shown that Telecom's complaint has failed to state a cause of action, and the striking of its answer would deprive Pacific Bell of the opportunity to be heard on the merits of Telecom's complaint. We will deny the Motion to Strike as the parties have fully briefed the issues raised by Telecom's complaint, and Telecom has had an opportunity to respond to defendant's arguments.

[14] Telecom*USA, Inc. v. Pacific Bell Telephone Company, *et al.*, 7 FCC Rcd 3521 (Com.Car.Bur. 1992) and Telecom*USA, Inc. v. Mountain States Telephone and Telegraph Company, *et al.*, 7 FCC Rcd 3849 (Com.Car.Bur. 1992) (*Discovery Orders*). Telecom propounded interrogatories to Pacific Bell on June 18, 1992 and to USWC on June 29, 1992. Pacific Bell responded on July 8, 1992 and USWC responded on July 17, 1992. On June 29, 1992, USWC propounded interrogatories to Telecom to which Telecom responded on July 17, 1992. Telecom filed its brief in the Pacific Bell proceeding on July 28, 1992 (Telecom Br.1) and in the USWC proceedings on August 6, 1992 (Telecom Br.2). Pacific Bell filed its brief on July 28, 1992 (Pacific Bell Br.). USWC filed its brief on August 6, 1992 (USWC Br.). Telecom filed its reply brief in the Pacific Bell proceeding on August 7, 1992 (Telecom RBr.1) and the USWC proceedings on August 17, 1992 (Telecom RBr.2). Pacific Bell filed its reply brief on August 10, 1992 (Pacific Bell RBr.). USWC filed its reply brief on August 20, 1992 (USWC RBr.).

[15] As a preliminary matter, we note that USWC has stated that it filed its brief directly with the Commission because it could find no order delegating damages authority to the Bureau. In addition, USWC formally objects if the Bureau is deciding these cases under delegated authority because it contends that the Bureau has been performing investigative and prosecutorial functions in these proceedings and cannot, under Section 554(d) of the Administrative Procedure Act (5 U.S.C. § 554(d)), act as decision maker here. USWC Br. at 2, n.7. While we agree with USWC that the damages issue must be decided by the Commission, 47 U.S.C. § 155(c)(1), the Bureau may deal with interlocutory matters such as discovery issues. We also disagree with USWC's characterization of the Bureau's activities regarding these complaint proceedings. The Bureau has at all times been acting as the "decision maker" and not as an "investigator" or "prosecutor."

III. DISCUSSION

A. Liability For Damages

1. Contentions of the Parties

5. Telecom alleges that the rates it paid for certain of the defendants' interstate access services during the period from October 1, 1985 through December 31, 1986 were unjust and unreasonable in violation of Section 201(b) of the Act. Telecom supports its allegations with evidence taken from reports filed with the Commission by the defendants for the 15-month period at issue that show that defendants achieved earnings in excess of the Commission's prescribed rate of return on one or more of the three interstate access categories established for the purpose of enforcing that rate of return prescription.[16]

6. Telecom requests that the Commission declare that the defendants' charges for the period from October 1, 1985 through December 31, 1986 are in violation of the rate of return prescription and Section 201(b) of the Act, and order the defendants to pay damages to Telecom equal to the difference between the amount actually paid by Telecom for interstate access service during the period and the amount that Telecom would have paid if the defendants' charges earned no more than the maximum allowable rate of return, plus interest.

7. The defendants raise a number of issues that have been fully considered by the Commission in the *MCI Orders*. They will be briefly discussed below.

8. Defendants advance a variety of arguments to support their claim that Telecom has failed to state a cause of action under the Act. Primarily, the defendants argue that Telecom's claims are barred by *American Telephone and Telegraph v. FCC*.[17] These arguments take several forms. Pacific Bell contends that renaming a "refund" as a "damage award" does not cure the inconsistencies the court found with respect to the automatic refund rule and allow the awarding of damages in the instant complaints.[18] The defendants argue that the Commission must consider underearnings in determining whether particular overearnings are in violation of the Act.[19] Finally, the defendants argue that it is contrary to *AT&T v. FCC* to find a rate of return violation when overall earnings for interstate access service did not exceed 13.10 percent regardless of access category earnings in excess of 13.25 percent.[20]

9. Defendants also argue that the Commission is engaging in retroactive ratemaking should it order a carrier to make refunds solely because the carrier has exceeded the authorized rate of return.[21] Additionally, Pacific Bell argues that there is no private cause of action that would permit an individual to recover damages based on overearnings.[22] Defendants also argue that the decision in *Ohio Bell*, issued after the release of the *MCI Liability Order*, requires dismissal of Telecom's complaints.[23] According to the defendants, *Ohio Bell* reaffirms the proposition established in *AT&T v. FCC* that the Commission cannot award damages for carrier overearnings without allowing the carrier to re-coup or off-set underearnings.[24] Defendants contend that these propositions are not confined to the Commission's ratemaking activities under Sections 204-205 of the Act[25] but are equally applicable when the Commission decides private complaints for damages under Section 208 of the Act.

10. Each of the defendants argues that all of Telecom's claims are barred by Section 415 of the Act, which establishes a two-year statute of limitations on the filing of

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[16] The interstate access service categories are special access, common line, and switched traffic sensitive. *See* 47 C.F.R. § 65.702 (1990). Telecom states that the monitoring reports recite that for the period October 1, 1985 through December 31, 1986: Pacific Bell earned a return of 14.51% in the switched traffic sensitive category; MTN earned returns in the switched traffic sensitive category of 14.60% in Arizona, 15.81% in Idaho, 15.20% in Montana, 14.97% in New Mexico, 13.67% in Utah, and 14.93% in Wyoming; PNB earned a return of 14.76% in the switched traffic sensitive category in Oregon; and NWB earned returns in the special access category of 14.31% in Iowa, 13.85% in Minnesota, 13.63% in Nebraska, and 16.01% in North Dakota, and earned returns in the switched traffic sensitive category of 14.64% in Iowa, 14.33% in Minnesota, 15.79% in Nebraska, and 19.71% in North Dakota.

[17] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC)*. The court invalidated the Commission's procedure to enforce its rate of return prescriptions through automatic refunds of carrier overearnings to customers. For a detailed discussion of *AT&T v. FCC, see MCI Liability Order*, 5 FCC Rcd at 221-223. The U.S. Court of Appeals for the Sixth Circuit, relying on *AT&T v. FCC*, vacated a Commission order dealing with refunds of earnings in excess of the authorized rate of return for the special access category over a period of years in the context of a strategic pricing investigation. *See Ohio Bell v. FCC*, 949 F.2d 864(6th Cir. 1991) (*Ohio Bell)*. The court primarily relied upon the statement from *AT&T v. FCC* that a rate of return prescription is both a minimum and a maximum prescription. *See AT&T v. FCC*, 836 F.2d at 1390. The Commission has clarified, however, that it does not view a rate of return prescription as both a maximum and a minimum and has stated that

> [o]ur accumulated experience with rate of return prescriptions, and our review of the cost of capital evidence in this proceeding, convince us that there is no such point. * * * We believe there is a substantial gap between an earnings level that is fully adequate to assure attraction of capital on favorable terms, and an earnings level which, if sustained over time, would be

Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, 5 FCC Rcd 7507, 7532 (1990), *appeal docketed sub nom. Illinois Bell Telephone Co., et al. v. FCC*, No. 90-1020 (D.C. Cir. Jan. 11, 1991).

[18] *See* Pacific Bell Br. at 8; USWC Br. at 5-6.

[19] *See, e.g.*, Pacific Bell Br. at 21-22.

[20] *See, e.g.*, Pacific Bell Br. at 6. Extending this argument even further, USWC contends that the rate of return with which Telecom should be concerned is the overall rate of return of USWC in the aggregate, not the individual category rates of return of USWC's individual subsidiaries. In the aggregate, USWC earned 12.73% overall. USWC Joint Motion at para. 17.

[21] *See, e.g.*, USWC Br. at 7-8. Pacific Bell argues specifically that under *Illinois Bell Tel. Co. v. FCC*, 966 F.2d 1478 (D.C. Cir. 1992) (*Illinois Bell)*, the Commission may not order refunds here, but retains only its authority to order prospective relief under Section 205 of the Act when the investigative and accounting requirements of Section 204(a) of the Act have not been met. Pacific Bell Br. at 10-11.

[22] Pacific Bell Br. at 14-17.

[23] *See, e.g., id.* at 7-8.

[24] *Id.* at 7.

[25] 47 U.S.C. §§ 204-205.

complaints.[26] According to the defendants, Section 415 bars the recovery of any damages if sought more than two years after the occurrence of any overearnings, in this case, thus barring all recovery sought after December 31, 1988.[27]

11. Telecom counters that, like *AT&T v. FCC, Ohio Bell* involved a Commission order under its public ratemaking authority, which must satisfy the "end result" test set forth in *Federal Power Commission v. Hope Natural Gas Co.*[28] Telecom argues that individual complaints for damages are not subject to the "end result test" articulated in *Hope*. Telecom points out that the court in *AT&T v. FCC* stated that "an agency rate order viewed in its entirety' must produce a just and reasonable total effect' on the regulated business."[29] In addition, the court was dealing with the industry-wide application of the automatic refund rule as a whole over the long run. According to Telecom, it was the operation of the refund rule in its entirety that was unreasonable. Telecom further argues that this proceeding is not equivalent to the refund rule governing all overearnings; rather, it is an individual complaint by Telecom for damages caused by the defendants' overearnings.[30] Telecom contends that *Ohio Bell* simply applied *AT&T v. FCC* to another Commission public enforcement proceeding, and the Court's reasoning is inapplicable to private Section 208 damages claims.[31]

2. Discussion

12. We have carefully examined the record before us and conclude that the defendants, all of whom were defendants in the MCI complaint proceedings, have cited no facts and have made no arguments here that would warrant a ruling contrary to the *MCI Orders*.

13. *Failure to State a Cause of Action:* In the *MCI Liability Order*, we rejected identical claims made by the same defendants and held that *AT&T v. FCC* establishes no precedent that bars an individual complainant from seeking a remedy under Section 208 of the Act for damages based on a carrier's reported overearnings.[32] We stated that

> we are not persuaded by defendants' claims that earning in excess of a prescribed rate of return does not violate that Act or, if it does, that the Commission *is required* to take a carrier's underearnings as well as its overearnings into account in determining whether a violation has occurred.
>
> * * * * * * *
>
> We find that a valid prescription bound the defendants to a maximum earnings limitation, and the defendants admit that they earned in excess of the amount during the period in question.[33]

We found further that *AT&T v. FCC* did not govern Section 208 complaint proceedings. The Commission has the authority to order a carrier to pay damages if a complainant meets the burden of establishing both a violation of the Act and the actual injury.[34]

14. In addition, we have previously held that enforcement of a rate of return prescription is not retroactive ratemaking because the obligation being enforced was set prospectively when the prescription was adopted.[35] Defendants have not persuaded us to alter our decision. We have also rejected the contention that rates charged in conformity with a lawfully filed tariff cannot be unjust and unreasonable.[36] We point out that the issue is not the lawfulness of high profits in the abstract, but the lawfulness of profits in excess of a prescription. Accordingly we hold that, taking into account the buffer, profits in excess of a prescription are unjust and unreasonable.

15. *Statute of Limitations:* Telecom is correct in its assertion that it had until two years after the filing of the defendants' monitoring reports within which to file its complaints.[37] We have previously held that the date of the filing of the final monitoring report is dispositive with regard to the date a complainant discovers the right or wrong or the facts on which such knowledge is chargeable as a matter of law.[38] Defendants have made no argument that persuades us to alter this holding. Section 415 does not bar Telecom's complaints.

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[26] Section 415 provides, in pertinent part, that "[a]ll complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after...." 47 U.S.C. § 415(b). The term "overcharges" is defined in Section 415 "to mean charges for services in excess of those applicable thereto under the schedules of charges lawfully on file with the Commission." 47 U.S.C. § 415(g).

[27] *See, e.g.*, USWC Joint Answer at p. 11.

[28] 320 U.S. 591 (1944) (*Hope*).

[29] Telecom Opposition to Supplement to Motion to Dismiss (Telecom*USA Opposition) at 7, citing to *AT&T v. FCC*, 836 F.2d at 1391-92.

[30] *See, e.g.*, Telecom Opposition at 8-9.

[31] *Id.*

[32] *MCI Liability Order*, 5 FCC Rcd at 222-23.

[33] *Id.* at 223 [emphasis in the original].

[34] *Id.*

[35] *Id.* at 222. We reject Pacific Bell's claim that the decision in *Illinois Bell* somehow leaves the Commission only with Section 205 authority in the face of a violation of our rate of return prescription. As we explained in the *MCI Damages Order*, *Illinois Bell* addresses the Commission's authority under Section 204, not Section 208. *See MCI Damages Order* at para. 27. The defendant's claim that the *Illinois Bell* decision deprives the Commission of authority to award damages for violations of a valid rate of return prescription has no merit.

[36] *MCI Liability Order*, 5 FCC Rcd at 222.

[37] *See, e.g.*, Telecom Reply to Joint Answer at 6. Telecom filed its informal complaints with the two-year period after defendants filed their monitoring reports. Telecom's formal complaints relate back to its informal complaints. *See* n.10, *supra*.

[38] In the *MCI Liability Order* we stated:

> the defendants filed the rate of return monitoring reports which...were developed by the Commission for several purposes, including making information about carrier earnings public[ly] available. Moreover, the monitoring reports relied on by MCI in its complaints were specifically designated by the Commission as a "final" and conclusively binding determination of a carrier's earnings.

5 FCC Rcd at 225. We note further that, we have held that Section 415(e) is inapplicable to the type of complaints we deal with here. Section 415(e) concerns a

16. *Ohio Bell:* We disagree with the defendants' claim that *Ohio Bell* and *AT&T v. FCC* compel us to dismiss Telecom's complaints. As we emphasized in the *MCI Liability Order* and reaffirmed in the *MCI Damages Order*, automatic refunds and refunds ordered under Section 204 of the Act are different from individual actions for damages under Section 208. Unlike the automatic refund mechanism in *AT&T v. FCC* or the refund procedure in *Ohio Bell*, both of which resulted from rulemaking proceedings initiated at the Commission's discretion, individual actions for damages under Section 208 are initiated by private parties seeking damages for injuries to themselves; those private parties have the burden of establishing both a violation of the Act and actual injury.[39] The courts in *AT&T v. FCC* and *Ohio Bell* did not discuss private complaints for damages; they did not invalidate private actions for damages; and their holdings are not applicable to the different separately authorized complaint procedure set forth in Sections 206-209. Accordingly, those decisions do not require us to depart from our holding in the *MCI Liability Order* that defendants have violated the Communications Act by earning in excess of a valid rate of return prescription, thereby making their rates unjust and unreasonable under Section 201 of the Communications Act and themselves liable for damages to the extent a complainant/customer can establish that it was damaged as a result of the violation.[40]

B. Damages and Interest Claims

17. Telecom's damages claims rest primarily on the contention that the proper measure of damages it incurred as a result of the defendants' rate of return prescription violations is the difference between the amounts it actually paid the defendants for interstate access services during the October 1, 1985 through December 31, 1986 monitoring period and the amount it would have paid if the defendants' rates produced earnings that did not exceed the Commission's prescription. The defendants, however, have raised a number of challenges to Telecom's damages claims, including a number of arguments that were previously considered and rejected by the Commission in the *MCI Liability Order* and the *MCI Damages Order*.[41] We address the parties' contentions below.

1. Damages

a. Contentions of the Parties

18. As referenced above, Telecom's damages claims rest primarily on the contention that the proper measure of the damages it incurred as a result of defendants' violations is the difference between the amount it actually paid defendants for interstate access services during the October 1, 1985 through December 31, 1986 period and the amount it would have paid if the defendants' rates had produced earnings that did not exceed the Commission's prescribed rate of return. In the *Discovery Orders*, the Bureau stated that it tended to agree, in principle, that a possible measure of the damages stemming from defendants' rate of return violations could be that difference.[42] The Bureau was not persuaded on the record before it, however, that a damages determination based solely on such a measure necessarily reflected actual damages incurred by Telecom.[43] The defendants were invited to submit evidence that could serve to mitigate or otherwise reduce Telecom's damages claims. Specifically, the Bureau stated that evidence demonstrating that Telecom's share of excessive earnings realized in a particular access category by a defendant could be offset or otherwise reduced due to facts and circumstances surrounding Telecom's purchase of other interstate access services from such defendant for the relevant monitoring period might be relevant.[44]

19. Telecom contends that it should be awarded damages of $11,231 from Pacific Bell and $498,014 from USWC, exclusive of interest.[45] Telecom states that the data underlying these calculations were taken from defendants' Forms 492, defendants' responses to discovery, other filings in these proceedings, and published tax tables.[46] To derive the stated amounts, Telecom first calculated, for each study area and access service category in which a defendant's earnings exceeded the rate of return prescription of 12.75% plus .50% buffer, the overall percentage that the service rates in the categories should have been reduced in order to yield earnings of no more than 13.25%. Telecom uses the following methodology to calculate the rate reduction percentage. Telecom calculates the dollar amount of excess earnings in each study area and for each service category, and then "grosses up" the excess earnings to account for the state and federal taxes that were taken out of defendants' excess revenues to yield excess earnings. For each service category in each study area, the excess revenue is then divided by the total revenues for that category and study area to yield the overall percentage by which the sum of the service rates in that category and study area should have been reduced to yield no more than 13.25%. The rate reduction percentages are used to calculate Telecom's excess payments to defendants. Telecom calculates its actual payments in each service category and study area. Telecom then derives the amounts it should have paid for each service category in each study area by applying a rate adjustment factor (1 minus the rate reduction percentage). Telecom contends that the difference between what Telecom actually paid and what it should have paid is the measure of damages.[47] Telecom also claims interest cal-

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carrier's liability to its customers for failure to transmit a message in accordance with its common carrier obligations. The instant complaints deal with the lawfulness of defendants' rates, not defendants' transmissions or obligations to transmit messages properly. *See MCI Reconsideration Order*, 5 FCC Rcd at 3464.

39 *See MCI Liability Order*, 5 FCC Rcd at 222-23.

40 *Id.* at 226.

41 The issues and arguments raised by Pacific Bell and USWC in response to Telecom claims are essentially identical. For the sake of convenience and clarity, we will refer to defendants' arguments as if they are part of the same pleading. To the extent that individual defendants raise separate or unique arguments, we will address them separately.

42 7 FCC Rcd at 3522, para. 6 and 7 FCC Rcd at 3850, para. 6.

43 *Id.*

44 *Id.*

45 The latter amount includes $486,865 from NWB, $9,640 from MTN, and $1,509 from PNB.

46 *See* Telecom Br.1 at 13; Telecom Br.2 at 14.

47 Telecom Br.1 at 13-15; Telecom Br.2 at 14-16.

culated at the IRS rate compounded daily.[48] Telecom contends it is entitled to interest on the damage amounts which, through July 30, 1992, totals $9,982 in the case of Pacific Bell and $445,233 in the case of USWC.

20. The defendants challenge Telecom's damages claims on a number of grounds, raising several arguments that were previously considered and rejected by the Commission in the *MCI Liability Order* and the *MCI Damages Order*. Defendants contend that by simply basing its damages claims on a calculation of Telecom's prorated share of category-level overearnings, Telecom asks the Commission to award it damages in the same amounts it would have received under the automatic refund rule invalidated by the court in *AT&T v. FCC*.[49] The defendants maintain that such a result is expressly precluded by *AT&T v. FCC*. The defendants add that the decision in *Ohio Bell* precludes an award of damages based solely on category level overearnings.

21. Defendants next contend that, even if *AT&T v. FCC* and *Ohio Bell* do not preclude Telecom's damages claims, the claims still fail because Telecom's complaints do not establish a valid cause of action. According to defendants, to pursue a damages claim, Telecom must first show that the defendants charged unjust and unreasonable rates for interstate access services during the period in question, not that defendants' rates produced excessive returns in individual service categories.[50] Moreover, defendants argue, Section 206 of the Act[51] requires Telecom to prove injury, causation, and the amount of damages in addition to establishing a violation of the Act.[52] Defendants maintain that by simply referencing defendants' earned rates of return for individual access service categories, Telecom has not only failed to allege any facts that would establish that defendants' rates were unjust and unreasonable during the period in question but has also failed to show that it sustained actual damage as a result of those rates.[53]

22. The defendants each raise distinct arguments to support their claims that an award of damages to Telecom based on carrier overearnings is inappropriate for equitable and policy reasons. USWC vigorously argues that Telecom is actually seeking restitution or a refund of tariffed charges, not damages. USWC argues that regardless of how Telecom characterizes the relief it seeks, any form of refund or restitution to Telecom would be contrary to the public interest.[54] USWC further contends that an award of damages would be inequitable because (i) USWC's total corporate rate of return would be driven below the confiscatory level; (ii) there was uncertainty surrounding the tariff filings during the relevant period; and (iii) Telecom would receive a windfall that would be inconsistent with sound equitable principles.[55]

23. For its part, Pacific Bell argues that Telecom's claim for damages is flawed because Telecom simply assumes that lower rates would have produced lower earnings and offers no probative evidence to show what a reasonable rate would have been or to otherwise support its damages claims.[56] Pacific Bell argues, as does USWC, that Telecom would receive a windfall if it has passed the "overcharges" on to its customers and is now awarded damages.[57] Pacific Bell argues that had its access charges to Telecom been lower in 1985-1986, it is almost certain that Telecom's rates to its customers would have been lower.[58] Pacific Bell cautions the Commission to look at the "backdrop of the practical consequences" and ensure that any decision granting Telecom "refunds" is equitable under the circum-

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[48] Telecom Br.1 at 15; Telecom Br.2 at 17-18.

[49] *See, e.g.*, USWC Br. at 4-6. In addition, defendants contend that *Ohio Bell* makes clear that it was the end result of the automatic refund mechanism, not the mechanism itself, that was unlawful. Pacific Bell Br. at 7.

[50] USWC argues that Telecom must specify an identifiable rate that Telecom paid that was too high or too low. USWC Br. at 10-13. In addition, USWC cites to a 1970 circuit court decision to support its claim that where retroactive relief is ordered for rates paid pursuant to a tariff that is subsequently found unjust and unreasonable, the Commission must determine what a just and reasonable rate is. *Id.* at 11, citing to *Middlewest Motor Freight Bureau v. United States*, 433 F.2d 212, 232 (8th Cir. 1970) (*Middlewest*), *cert. denied*, 402 U.S. 999 (1971). As we determined in the *MCI Damages Order*, USWC's reliance on *Middlewest* is misplaced. *MCI Damages Order* at n.56.

[51] *See* 47 U.S.C. § 206.

[52] *See, e.g.*, Pacific Bell Br. at 17-18.

[53] *See, e.g.*, Pacific Bell Br. at 17-18; USWC Br. at 12. USWC contends that the principle that Telecom*USA must still prove it was damaged and in what amount was established by the Supreme Court in *Southern Ry. Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 454-55 (1979) (*Seaboard*), in construing relevant sections of the Interstate Commerce Act. The Court stated:

> [O]ur sole concern is the Commission's decision not to investigate under § 15(8)(a) [204], a decision that has only two final consequences. First, the burden of proof with regard to *reasonableness* is placed on the shipper under § 13(1) [208] rather than on the carrier, who would have borne it in a § 15(8)(a) [204] proceeding. (With respect to all other aspects of lawfulness, however, the burden is borne by the shipper in both proceedings.) Second, the shipper's relief, if unlawf ulness is proved, is limited under § 13(1) [208] to actual damages rather than the full refund of overcharges available under § 15(8)(a) [204].

USWC states that this ruling has been found applicable to proceedings under the Communications Act. *See Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221, 1235 n.35 (D.C. Cir. 1980) (*ARINC*), *cert. denied*, 451 U.S. 920 (1981). Here too, as we determined in the *MCI Damages Order*, USWC's reliance on case precedent is misplaced. *MCI Damages Order* at n.59.

[54] USWC Br. at 13-19. USWC argues Telecom must plead its case in equity and the Commission may only award a refund/damages if we find that the public interest will be served by a refund/damages award to Telecom. USWC contends that the leading case in this area is *Moss v. Civil Aeronautics Board*, 521 F.2d 298 (D.C. Cir. 1975) (*Moss*), *cert. denied sub nom. Roberts v. Civil Aeronautics Board*, 424 U.S. 966 (1976), *reh'g denied*, 425 U.S. 966 (1976). USWC states that the refund in *Moss* "was governed by the equitable principles governing the law of restitution." USWC Br. at 14, citing to *Moss*, 521 F.2d at 304. We addressed this argument in the *MCI Damages Order* and found USWC's reliance on *Moss* to be misplaced. *MCI Damages Order* at n.60.

[55] USWC Br. at 17-19.

[56] Pacific Bell Br. at 19.

[57] *See, e.g., id.* at 13.

[58] *Id.* at 19. Pacific Bell cites to numerous newspaper and magazine articles to support this contention.

stances.[59] Pacific Bell further argues that, should the Commission award damages to Telecom, the Commission should order Telecom to pass the damages through to its end users in the form of a rate reduction.[60]

24. Finally, Pacific Bell argues that any award of damages to Telecom based on overearnings should be reduced by Pacific Bell's underearnings in the common line category (earnings under 12.75%) and an automatic refund in the switched traffic sensitive category which Pacific Bell claims it made in 1988 prior to the court's decision invalidating the automatic refund rule.[61] Taking these factors into consideration, Pacific Bell claims that Telecom has already received a windfall of approximately twelve thousand dollars from undercharges and amounts already refunded.

25. Telecom counters that defendants' threshold arguments regarding the effect of the court's ruling in *AT&T v. FCC* have largely been rejected or precluded by the *MCI Liability Order*.[62] Telecom states that defendants' arguments that it has failed to allege and prove violations of the Act and actual damage are unfounded because it has made a sufficient showing of each under traditional principles governing its statutory right to such relief. According to Telecom, the only injury and causation it need show are the injury and causation arising from its payment of excessive rates for services it purchased from defendants during the relevant period. Telecom maintains that it has shown that defendants charged it rates that produced earnings in excess of the Commission's prescribed rate of return and argues that its damages are the excessive charges that Telecom paid.[63]

26. Telecom further argues that equitable considerations are relevant only to the Commission's public enforcement remedies and not to private complaints for damages because the Commission has no discretion in the award of damages under Sections 206-209 of the Act.[64] Telecom states that Pacific Bell's equitable arguments regarding the failure of Telecom to flow-through damages it might recover are also irrelevant to private complaint actions[65] and Pacific Bell cannot properly raise a "passing-on" defense.[66] Telecom states that USWC has implicitly conceded that defendants' equitable defenses are germane only if Telecom's claim is equitable in nature, i.e., a disguised claim for a refund or restitution under the Commission's public enforcement authority.[67] Telecom reiterates that its claims are actions for damages under Section 206-209 of the Act, not for restitution or refunds.

27. Telecom next argues that defendants' offset arguments should be rejected because the Commission has already held that cross-subsidies in earning categories are not allowed. Moreover, Telecom claims, offsets are in the nature of counterclaims and as such, are not within the Commission's jurisdiction because they would involve the determination of a carrier's rights against a customer.[68] Telecom adds that offsets would violate the "filed-rate doctrine" because defendants would, in effect, be allowed to recoup undercharges through retroactive rate adjustments as well as discriminate against those customers against whom such offsets were allowed.[69]

28. Telecom further contends that Pacific Bell should not be given credit for its claimed partial refund of excess switched traffic sensitive charges in 1988.[70] Telecom contends that Pacific Bell has not shown that Telecom received a benefit from the switched traffic sensitive rate reduction. In any event, Telecom argues, since Pacific Bell overearned in this category in 1987-1988, the rate reduction is meaningless.

b. Discussion

29. *AT&T v. FCC and Ohio Bell:* The defendants' claims that the holdings in *AT&T v. FCC* and *Ohio Bell* control these proceedings and bar an award of damages to Telecom are without merit for the reasons stated in both the *MCI Liability Order* and the *MCI Damages Order*. In the liability section above, we again emphasized that the court in *AT&T v. FCC* explicitly acknowledged the Commission's authority to order a carrier to disgorge earnings in excess of a rate of return prescription,[71] finding only the remedy component of the Commission's rate of return prescription (the automatic refund mechanism) to be unlawful.[72] More to the point, we emphasized that "the [*AT&T v. FCC*] opinion does not address Section 208 complaint proceedings nor purport to alter the statutory scheme of the Act or the remedies Congress established therein."[73] Similarly, as we stated in the *MCI Damages Order*, the *Ohio Bell* de-

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[59] Pacific Bell Br. at 20-21. *See also* USWC Br. at 15 citing to *Las Cruces TV Cable v. FCC*, 645 F.2d 1041 (D.C. Cir. 1981) (*Las Cruces*). In *Las Cruces*, the court upheld, in part, and remanded, in part, a Commission decision requiring refunds under Section 204 of the Act. The court noted that *Las Cruces*

> is the first time that the Federal Communications Commission has attempted to articulate standards governing its award of refunds to customers of a communications common carrier under Section 204 of the Act.

645 F.2d at 1046. USWC's reliance on *Las Cruces* is unavailing, however, because equitable considerations that may impact a Section 204 investigation are not applicable in individual Section 208 complaint proceedings.

[60] Pacific Bell Br. at 20-21.

[61] *Id.* at 21-22.

[62] Telecom RBr.1 at 3-4; Telecom RBr.2 at 3-4.

[63] *See, e.g.*, Telecom RBr.2 at 9-14.

[64] Telecom RBr.1 at 21.

[65] *Id.* at 18-21.

[66] Telecom argues that the press clippings cited to by Pacific Bell are insufficient to establish this defense. *Id.* at 21.

[67] Telecom RBr.2 at 15.

[68] Telecom RBr.1 at 26-30 and Telecom RBr.2 at 27-30 citing to Thornell Barnes Co. v. Illinois Bell Telephone Co., 1 FCC Rcd 1247, 1275 (1965) (*Thornell Barnes*); Illinois Bell Telephone Company v. AT&T, 4 FCC Rcd 5628, 5270 at ¶17 -18 (1989) (*Illinois Bell II*), *recon. denied*, 4 FCC Rcd 7759 (1989); *Pennsylvania R. Co. v. Fox & London, Inc.*, 93 F.2d 669 (2d Cir. 1938).

[69] Telecom RBr.1 at 30-31; Telecom RBr.2 at 30-33.

[70] Telecom RBr.1 at 33-34.

[71] *AT&T v. FCC*, 836 F.2d at 1392 ("Thus, as we previously have concluded, the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate of return prescription").

[72] Indeed, the court in *Ohio Bell* recognized the continuing efficacy of our rate of return framework. *See* 949 F.2d at 868.

[73] *MCI Liability Order*, 5 FCC Rcd at 223.

cision does not expand upon *AT&T v. FCC* and does not address the Commission's authority to award damages in private complaint actions under Section 208 of the Act.[74]

30. *Section 201(b) of the Act:* We turn now to the defendants' contention that Telecom's damages claims must be dismissed because Telecom has failed to prove defendants' rates were unjust and unreasonable within the meaning of Section 201(b) of the Act. In the liability section above, we held that the complainant met its burden of proof by establishing that the defendants violated our rate of return prescription.[75] Accordingly, the question before us now is not whether defendants' rates were unjust and unreasonable; rather the question now is whether the complainant suffered any measurable damage as a consequence of paying rates previously determined by the Commission to be unlawful under Section 201(b).

31. The defendants next claim, that even if Telecom has sustained its burden and shown that defendants' rates were unjust and unreasonable, its damages claims must still fail because judicial precedent compels Telecom to establish what a just and reasonable rate would have been as a prerequisite to pursuing damages claims based on unreasonable rates,[76] has previously been discussed and rejected by the Commission. In the *MCI Damages Order* we reemphasized[77] the Commission's authority to prescribe and enforce carriers' rates of return, pointed out that the issue in these proceedings is not whether individual rates are unlawful, but whether cumulative rates that produced earnings over and above a prescribed rate of return are unjust and unreasonable, and agreed with the Bureau's determination in the *Discovery Order* that a proper starting point for assessing damages based on violations of a rate of return prescription is to look at the difference between the amount complainant paid for defendants' interstate access services and the amount it would have paid if defendants had charged rates that produced returns within the Commission's prescribed levels.[78] We said, "[i]t is appropriate and consistent with the Commission's rate of return regulatory scheme to inquire as to earnings in excess of prescribed levels for purposes of assessing damages claims."[79] Telecom has shown that it purchased services from defendants at rates that produced earnings over and above the defendants' prescribed levels. We previously determined in the *MCI Liability Order* that a violation of such a prescription constitutes a violation of the Act for which damages may lie.

32. *Damages and Offsets:* The defendants' arguments are devoted primarily to attempting to persuade the Commission that Telecom's damages claims are really claims for restitution or refunds governed by equitable or public policy considerations. These considerations, according to defendants, militate against any award of damages to Telecom based on excessive earnings. The defendants argue, in effect, that the damages Telecom seeks are equivalent to refunds that would have been required under the refund mechanism invalidated by the court in *AT&T v. FCC*. We do not agree. We are concerned here with determining whether a particular customer, which has availed itself of a statutory complaint remedy under Title II of the Act, has sustained any measurable damage that can be traced to defendants' violations of the Act. Although a damages award under Section 208 of the Act might well be equal or substantially similar to a refund ordered under Section 204 of the Act,[80] this does not transform a private complaint action into a public enforcement proceeding subject to broad public interest considerations.

33. As in the *MCI Damages Order*, we find defendants' arguments with respect to "passing-on" equally unavailing. In rejecting this same argument, we said, "[w]hether [complainant] passed on the overcharges or absorbed them does not alter the fact that the defendants overcharged [complainant] in violation of a binding rate of return prescription and must answer for such violations."[81] The issue is not what Telecom has done in response to paying excessive rates, but whether Telecom has been damaged as a result of these excessive rates.[82]

34. Nor can we accept the defendants' related claim that we should require Telecom to flow through any damages it may receive to its end user customers. Sections 206-209 of the Act give private parties the right to file complaints challenging the acts or omissions of carriers and to recover monetary damages resulting from such acts or omissions. Complainants, however, are charged, as Telecom is in the instant case, with the burden of establishing violations of the Act or Commission rule or order and the amount or extent of damage suffered as a consequence of such violations. Accepting defendants' flow through argument would, in effect, transform Telecom's complaints into class action suits on behalf of its customers, a result neither expressly contemplated by nor consistent with the private remedy created under Sections 206-209 of the Act.

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[74] *MCI Damages Order* at para. 26.

[75] In the *MCI Liability Order*, we held that the complainant therein could prove that defendants' rates were unjust and unreasonable by proving that the defendants violated our rate of return prescription. *See MCI Liability Order*, 5 FCC Rcd at 226.

[76] USWC Br. at 10, citing *Middlewest*, 433 F.2d 212, 232.

[77] For a full discussion of the Commission's authority to prescribe and enforce carriers' rates of return, *see MCI Liability Order*, 5 FCC Rcd at 222-23.

[78] *MCI Damages Order* at para. 29.

[79] *Id.*

[80] *See Seaboard*, 442 U.S. 444, 455, n.8:

> If a shipper proves a rate is unreasonable and that he was damaged in the full amount he was overcharged, the outcome of a § 13(1) [§ 208] proceeding will be no different than that of a § 15(8)(a) [§ 204] proceeding in which the carrier fails to establish the reasonableness of the rate.

[81] *MCI Damages Order* at para. 31.

[82] While defendants have asserted that lower charges to complainant would have resulted in lower charges to complainant's customers, they have provided no persuasive evidence in support of this contention. Pacific Bell, for example, relies solely on press clippings that purportedly show that Telecom's rates to its customers would have been affected by changes in defendants' rates. Pacific Bell Br. at 19-20. These clippings do not, however, establish, as a matter of law, that complainant, in fact, passed on defendants' overcharges to its customers.

35. In addition, we reject USWC's contention that a damages award to Telecom is precluded because it would drive USWC's overall rate of return for USWC in the aggregate below the minimum necessary to raise capital to confiscatory levels. Assuming *arguendo*, that such an inquiry is relevant to a Section 208 damages claim, USWC has failed to provide sufficient record evidence for the Commission to assess the impact of any damages award upon its overall interstate rate of return. While USWC has provided some data in Exhibit A to its brief,[83] these data made no clear showing of the amount by which an award to Telecom would reduce USWC's overall interstate earnings or rate of return let alone that any such reduction would be confiscatory. For the reasons stated in the *MCI Damages Order*,[84] we find USWC's other equitable arguments regarding the uncertainty surrounding tariff filings during the 1985-86 period and an alleged windfall to Telecom should it receive restitution equally unavailing.

36. For the reasons set forth in the *MCI Damages Order*, we reject Telecom's claims that the allowance of offsets would, in effect be a determination of a carrier's rights against a customer or would violate the filed rate doctrine.[85] We also reject Telecom's claim that the allowance of offsets would somehow repeal our rate return prescription on a category basis. The issue of damages to a particular complainant is separate and apart from the validity and effect of our rate of return prescription. The determination we make here is the extent to which complainant suffered damage on account of defendants' violations of the rate of return prescription. The question of offsets is relevant to that determination and no other.

37. Pacific Bell, however, does raise factors which it believes warrant an offset against Telecom's damages claims. Pacific Bell states that it underearned on its common line services during the period in question and that Telecom's prorated share of those underearnings is approximately $6,000. Pacific Bell argues that taking into account its underearnings and the 1988 refund for the switched traffic sensitive category, a net undercharge to Telecom of approximately $26,000 results.[86]

38. USWC also provides specific calculations for offsets in its reply brief.[87] USWC states that Telecom's base damage award from USWC should be reduced by approximately $250,517 to take into account underearnings for NWB in South Dakota, MTN in Colorado, and for PNB in Idaho and Washington. In addition, USWC argues that Telecom's use of marginal tax rates instead of effective tax rates results in an overstatement of USWC's overearnings. USWC also argues that its switched traffic sensitive access category overearnings are overstated because intercept and information amounts are not included on the Forms 492 filed for each state for that access category.

39. We have carefully reviewed the arguments and evidence presented by the parties and believe that some offset to the claimed damages amounts is appropriate. In the *MCI Liability Order*, we specifically rejected claims by the defendants that the Commission is required to take a carrier's interstate access underearnings as well as overearnings into account in determining whether a violation of the Act has occurred because this would be at odds with established case law.[88] However, we stated in the *MCI Damages Order* that it is appropriate to consider defendants' underearnings in assessing complainant's damage or injury resulting from defendant's overearnings in a particular monitoring period[89] and rejected the complainant's contention that this approach results in unlawful cross-subsidization.[90] The parties have made no argument which persuades us to alter our holdings. In addition, we reject USWC's late attempt to modify the revenues reported on its Forms 492 to include switched access intercept and information amounts. We do agree with USWC, however, that the effective tax rates should be used in the damages calculations, rather than the marginal tax rates, because the effective tax rates accurately reflects the tax rates paid be defendant. Finally, we will recalculate USWC's offsets for underearnings at a rate of return of 12.75%, rather than a rate of return of 13.25% employed by USWC. We note that 13.25% is the target rate of return plus buffer for category earnings. USWC, however, can not be said to have underearned to the extent that its earnings exceeded the target rate of return of 12.75%. Therefore, USWC's offset calculations are in error to the extent it calculated underearnings in access service categories at the target rate of return plus buffer for such categories.

40. Based upon our decision regarding the computation of damages here, we will not award damages to Telecom from Pacific Bell.[91] In reaching this amount, we have accepted Telecom's calculation of Pacific Bell's overearnings for the switched traffic sensitive category. We have

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[83] Exhibit A contains a summary and compilation of information submitted in MTN's, NWB's, and PNB's Forms 492 for the relevant monitoring period, a calculation of how much money USWC would have earned if its entire carrier enterprise earned exactly at a 12.75% rate of return, and the same calculation at a 13.10% rate of return.

[84] *MCI Damages Order* at para. 32.

[85] *MCI Damages Order* at paras. 33-34.

[86] We note that Telecom contends that Pacific Bell should pay damages in the amount of $11,231. Pacific Bell contends that the amount in question is approximately $11,000 before offsets and before deducting the $6,000 refund. The difference of $231 appears to be primarily the result of Pacific Bell rounding the figures used in its calculations. Without rounding, Pacific Bell's calculations result in overearnings of $11,200.76. We will accept Telecom's calculation of the overearnings.

[87] USWC RBr. at Attachment B.

[88] *MCI Liability Order*, 5 FCC Rcd at 223, citing *Nader v. FCC*, 520 F.2d 182, 201 (D.C. Cir. 1975). *See also New England Tel. & Tel. Co. v. FCC*, 826 F.2d 1101 (D.C. Cir. 1987), *cert denied*, 109 S.Ct. 1942 (1989); and *AT&T v. FCC*.

[89] *MCI Damages Order* at para. 38.

[90] *Id.* at para. 39.

[91] As explained in para. 40, this amount is calculated as follows:

also allowed the offset of undercharges in the common line category in the amount of $6,000 and of the $31,000 refunded by Pacific Bell in 1988.

41. Based upon our decision regarding the computation of damages here, we award damages to Telecom from MTN in the amount of $9,402.[92] In reaching this amount, we have recalculated MTN's underearnings at 12.75% and its overearnings without the inclusion of switched traffic intercept and information.

42. Based upon our decision regarding the computation of damages here, we award damages to Telecom from NWB in the amount of $320,299.[93] In reaching this amount, we have recalculated NWB's underearnings at 12.75%.

43. Based upon our decision regarding the computation of damages here, we will not award damages to Telecom from PNB.[94] In reaching this amount, we have recalculated PNB's underearnings at 12.75%.

2. Interest on Damages Awards

a. Contentions of the Parties

44. Defendants' final claim is that Telecom is not entitled to prejudgment interest should the Commission award damages to Telecom. Pacific Bell grounds its claim on its contention that the amount of damages has been sharply disputed in these proceedings.[95] Pacific Bell claims that interest would penalize it even though it has not been accused of deliberate wrongdoing and interest is not necessary to make Telecom whole. USWC simply contends that while the Commission may award interest under Section 204 of the Act, there is no provision for the award of interest under Section 206 of the Act. Because we cannot lawfully grant Telecom a refund, USWC argues, we may not award interest.[96]

45. Telecom disputes defendants' claims that it is not entitled to prejudgment interest at the IRS rate in connection with any ultimate damages award. Telecom contends that an award of prejudgment interest is appropriate in the instant case because it is explicitly provided for in the parallel refund remedy under Section 204(a)(1) of the Act,[97] and is typically awarded in overcharge cases under the Act in order to make the injured party whole. Telecom contends it is entitled to interest at the IRS rate from May 15, 1986 through July 30, 1992 of $9,982 from Pacific Bell and $445,233 from USWC.[98]

$ 11,231 (overcharges - switched traffic sensitive category)
- 6,000 (undercharges - common line category)
- 31,000 (refund - switched traffic sensitive category)
$ 0 Damages

[92] As explained in para. 41 this amount is calculated as follows:

$ 5,736 (overcharges - switched traffic sensitive category/AZ)
2,431 (overcharges - switched traffic sensitive category/NM)
305 (overcharges - switched traffic sensitive category/UT)
930 (overcharges - switched traffic sensitive category/WY)
$ 9,402 Damages

USWC is not entitled to an offset for Colorado. A recalculation of the earnings consistent with our decision here results in no underearnings for that state.

[93] As explained in para. 42 this amount is calculated as follows:

$ 211,421 (overcharges - switched traffic sensitive category/IA)
+ 12,688 (overcharges - switched traffic sensitive category/MN)
+ 29,142 (overcharges - switched traffic sensitive category/NE)
- 6,289 (undercharges - switched category SD)
+ 102,852 (overcharges - special access category/IA)
+ 2,722 (overcharges - special access category/NE)
- 32,237 (undercharges - special access category/SD)
$ 320,299 Damages

We note that we are relying on USWC's basic calculations because Telecom miscomputed its charges from USWC for switched traffic sensitive access services. In addition, we note that Telecom computed damages for overearnings in North Dakota and not in Nebraska, while USWC computed overearnings in Nebraska and not in North Dakota. We will accept USWC's basic calculations for overearnings in Nebraska because its calculations appear to be more accurate than those of Telecom.

[94] As explained in para. 43, this amount is calculated as follows:

$ 1,487 (overcharges - switched traffic sensitive category/OR)
- 1,491 (undercharges - switched traffic sensitive category/ID)
$ 0 Damages

[95] *See, e.g.*, Pacific Bell Br. at 22-24.
[96] USWC Br. at 13.
[97] *See* 47 U.S.C. § 204(a)(1). Telecom Br.2 at 11.
[98] Telecom Br.1 at 15; Telecom Br.2 at 17.

b. Discussion

46. The defendants' claim that the Commission lacks authority to award interest in a Section 208 common carrier complaint proceeding has no merit. Although Section 208 of the Communications Act does not explicitly authorize an award of interest, our authority under Sections 4(i) and other sections of the Act to award interest in a common carrier complaint case is well established.[99] In deciding whether to award interest in a particular common carrier complaint case we are generally guided by federal court practice, where the award of prejudgment interest "... is a matter left to the sound discretion of the trial court."[100] The award of interest in a common carrier complaint case is thus guided by considerations of fairness. Applying this criterion we believe that interest is appropriate in these cases. It is undisputed that defendants' earning levels were readily ascertainable at the time the complaints were filed, as was the extent to which those earnings exceeded the Commission's prescribed level. During the pendency of the complaint proceedings, Telecom has been effectively deprived of the use of the amounts it paid that are attributable to defendants' unlawful rates. We are persuaded that interest is required to effect a full and fair remedy for Telecom, which paid rates higher than it would have paid had defendants earned within the prescribed level, but also to avoid any unjust enrichment of defendant stemming from its charging rates that we have determined to be unjust and unreasonable under Section 201(b) of the Act.[101] We conclude that interest should be computed at the IRS rate for tax refunds, not at the rate AT&T requests.[102] We find that interest should accrue from January 1, 1987, the day after which the 1985-1986 monitoring period ended. At that point, defendants were subject to the earnings limitations of a different monitoring period. Accordingly, we award interest calculated at the IRS rate for tax refunds[103] from Mountain States Telephone and Telegraph Company and Northwestern Bell Telephone Company to Telecom from January 1, 1987 until the date of full payment to Telecom.

IV. CONCLUSION

47. We have carefully reviewed the extensive record before us and have found, to the extent indicated here, that complainant is entitled to an award of damages, plus accumulated interest on such damages, for Mountain States Telephone and Telegraph Company's and Northwestern Bell Telephone Company's violations of our rate of return prescription for the 1985-1986 monitoring period.

V. ORDERING CLAUSES

48. Accordingly, IT IS ORDERED, pursuant to Section 4(i), 4(j), 201, 206, 207, 208 and 209 of the Communications Act, as amended, 47 U.S.C. §§ 4(i), 4(j), 201, 206, 207, 208 and 209, that the above-captioned complaints filed by Telecom*USA, Inc. ARE GRANTED to the extent discussed above and otherwise ARE DENIED.

49. IT IS FURTHER ORDERED that Mountain States Telephone and Telegraph Company SHALL PAY to Telecom*USA, Inc. the sum of $9,402 (Nine thousand four hundred two dollars) within 60 days after the release date of this Memorandum Opinion and Order; and that Northwestern Bell Telephone Company SHALL PAY to Telecom*USA, Inc. the sum of $320,299 (Three hundred twenty thousand two hundred ninety-nine dollars) within 60 days after the release date of this Memorandum Opinion and Order.

50. IT IS FURTHER ORDERED that Mountain States Telephone and Telegraph Company and Northwestern Bell Telephone Company SHALL PAY to Telecom*USA, Inc. interest on the damages awarded here at the IRS rates set forth in Appendix A from January 1, 1987 until the date full payment is made.

51. IT IS FURTHER ORDERED that the Supplement to Motion to Dismiss filed by USWC on February 13, 1992 IS ACCEPTED for filing.

52. IT IS FURTHER ORDERED that the Joint Motion to Dismiss filed by USWC on July 20, 1990 IS DENIED.

53. IT IS FURTHER ORDERED that the Motion to Strike filed by Telecom*USA, Inc. on July 24, 1990 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[99] *See* MCI Telecommunications Corporation v. American Telephone and Telegraph Company, *et al.*, 94 FCC 2d 332, 343-46 (1983).

[100] *United States v. California Board of Equalization*, 650 F.2d 1127, 1132 (9th Cir. 1981), *aff'd*, 456 U.S. 901 (1982), *reh'g denied*, 456 U.S. 985 (1982).

[101] *See New England Telephone and Telegraph Co. v. FCC*, 826 F.2d 1101, 1113 (D.C. Cir. 1987), *cert. denied*, 109 S. Ct. 1942 (1989) (carriers may reasonably be required "to pay full interest for earnings they had no right to retain in the first place.").

[102] We believe that the rationale adopted by the Commission for applying the IRS rate in pole attachment complaint proceedings under Section 204 of the Act, 47 U.S.C. § 204, is equally applicable here. In Teleprompter of Fairmont v. C&P of West Virginia, 79 FCC 2d 232 (1980), the Commission stated

> As a matter of fairness, we believe that the rate of interest applied in a pole attachment complaint proceeding should be readily available, easily applied, and periodically revised to reflect changes in borrowing costs. In light of these considerations, we find the interest rate for federal tax refunds and additional tax payments suitable for use in this type of proceeding. This rate appears in a variety of easily obtained official and commercial publications, and is revised on a regular basis. [Footnote omitted.]

79 FCC 2d at 238.

[103] The applicable IRS rates are set forth in Appendix A.

APPENDIX A

Effective Period	Rate	Internal Revenue Service Citation
01/01/87 - 03/31/87	8%	Rev.Rul. 146, 1986-2 C.B. 208
04/01/87 - 06/30/87	8%	Rev.Rul. 87-23, 1987-13 I.R.B. 46
07/01/87 - 09/30/87	8%	Rev.Rul. 87-62, 1987-29 I.R.B. 10
10/01/87 - 12/31/87	9%	Rev.Rul. 87-87, 1987-36 I.R.B. 8
01/01/88 - 03/31/88	10%	Rev.Rul. 87-131, 1987-50 I.R.B. 6
04/01/88 - 06/30/88	9%	Rev.Rul. 88-17, 1988-10 I.R.B. 6
07/01/88 - 09/30/88	9%	Rev.Rul. 88-50, 1988-25 I.R.B. 39
10/01/88 - 12/31/88	10%	Rev.Rul. 88-86, 1988-41 I.R.B. 1
01/01/89 - 03/31/89	10%	Rev.Rul. 88-105, 1988-51 I.R.B. 4
04/01/89 - 06/30/89	11%	Rev.Rul. 89-36, 1989-1 C.B. 309
07/01/89 - 09/30/89	11%	Rev.Rul. 89-69, 1989-1 C.B. 310
10/01/89 - 12/31/89	10%	Rev.Rul. 89-99, 1989-2 C.B. 256
01/01/90 - 03/31/90	10%	Rev.Rul. 89-125, 1989-2 C.B. 257
04/01/90 - 06/30/90	10%	Rev.Rul. 90-19, 1990-1 C.B. 186
07/01/90 - 09/30/90	10%	Rev.Rul. 90-47, 1990-1 C.B. 187
10/01/90 - 12/31/90	10%	Rev.Rul. 90-71, 1990-35 I.R.B. 4
01/01/91 - 03/31/91	10%	Rev.Rul. 90-94, 1990-46 I.R.B. 16
04/01/91 - 06/30/91	9%	Rev.Rul. 91-20, 1991-11 I.R.B. 1
07/01/91 - 09/30/91	9%	Rev.Rul. 91-33, 1991-21 I.R.B. 1
10/01/91 - 12/31/91	9%	Rev.Rul. 91-50, 1991-37 I.R.B. 1
01/01/92 - 03/31/92	8%	Rev.Rul. 91-65, 1991-51 I.R.B. 1
04/01/92 - 06/30/92	7%	Rev.Rul. 92-21, 1992-14 I.R.B. 14
07/01/92 - 09/30/92	7%	Rev.Rul. 92-44, 1992-24 I.R.B. 86
10/01/92 - 12/31/92	6%	Rev.Rul. 92-77, 1992-38 I.R.B. 12

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ALLNET COMMUNICATION SERVICES, INC.,
Complainant,

v.

THE DIAMOND STATE TELEPHONE COMPANY,	File No. E-89-343
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	File No. E-89-344
WISCONSIN BELL, INC.,	File No. E-89-345
MICHIGAN BELL TELEPHONE COMPANY,	File No. E-89-346
NEW JERSEY BELL TELEPHONE COMPANY, and	File No. E-89-347
PACIFIC BELL TELEPHONE COMPANY,	File No. E-89-348

Defendants.

MEMORANDUM OPINION AND ORDER

Adopted: January 29, 1993; Released: February 26, 1993

By the Commission:

TABLE OF CONTENTS

Topic	Paragraph No.
I. INTRODUCTION	1
II. BACKGROUND	2 - 4
III. DISCUSSION	5 - 42
A. Liability for Damages	5 - 16
1. Contentions of the Parties	5 - 12
2. Discussion	13 - 16
B. Damages, Interest, and Attorney's Fees Claims	17 - 42
1. Damages	17 - 38
a. Contentions of the Parties	17 - 22
b. Discussion	23 - 38
2. Interest on Damages	39 - 41
a. Contentions of the Parties	39 - 40
b. Discussion	41
3. Attorney's Fees	42
IV. CONCLUSION	43
V. ORDERING CLAUSES	44 - 52

I. INTRODUCTION

1. In this Memorandum Opinion and Order we find that Allnet Communication Services, Inc. (Allnet) has met its burden of establishing that defendants[1] have violated Section 201(b) of the Communications Act by earning in excess of the rate of return prescribed by the Commission for the period October 1, 1985 through December 31, 1986. In addition, we award damages to Allnet for defendants' violations of the Commission's rate of return prescription for the reasons and to the extent indicated below. We also grant Allnet's request for interest on the damages awarded here. However, we decline to grant Allnet's request for attorney's fees and costs.

II. BACKGROUND

2. The Commission has previously held that local exchange carriers (LECs) who had earned in excess of the prescribed rate of return for October 1, 1985 through December 31, 1986 violated Section 201(b) of the Communications Act (the "Act").[2] These decisions establish that carrier rates producing earnings in excess of the Commission's prescribed rate of return violate Section 201(b) of the Act[3] and allegations of such overearnings are sufficient to sustain a cause of action under Section 208 of the Act. Furthermore, the Commission has held that complainants may recover damages, including interest, from LECs who violated the Commission's rate of return prescription.[4]

3. While a detailed accounting of the applicable statutory scheme and relevant Commission and court decisions that preceded the filing of the captioned complaints is set forth in the *MCI Liability Order*[5] and will not be repeated here, a very brief review of the relevant rate of return prescription is helpful. The Commission prescribed a rate of return of

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[1] Defendants are: The Diamond State Telephone Company (Diamond State), The Chesapeake and Potomac Telephone Companies (C&P), and New Jersey Bell Telephone Company (New Jersey Bell) (collectively "Bell Atlantic"); Wisconsin Bell, Inc. (Wisconsin Bell) and Michigan Bell Telephone Company (Michigan Bell) (collectively "Ameritech"); and Pacific Bell Telephone Company (Pacific Bell).

[2] MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co., *et al.*, 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon. denied*, 5 FCC Rcd 3463 (1990) (*MCI Reconsideration Order*) (jointly "*MCI Orders*"); *appeal dismissed sub nom. Mountain States Tel. and Tel. Co., et al. v. FCC*, 951 F.2d 1259 (10th Cir. 1991) (per curiam) and American Telephone and Telegraph Co. v. Northwestern Bell Telephone Co., 5 FCC Rcd 143 (1990), *appeal dismissed sub nom. Mountain States Tel. and Tel. Co., et al. v. FCC*, 951 F.2d 1259 (10th Cir. 1991) (per curiam).

[3] 47 U.S.C. § 201(b). This Section provides, in pertinent part, that "[a]ll charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful."

[4] MCI Telecommunications Corporation v. Pacific Bell Telephone Company, FCC 93-70 (released February 8, 1993) (*MCI Damages Order*).

[5] *MCI Liability Order*, 5 FCC Rcd at 217-218.

12.75 percent for the initial monitoring period of October 1, 1985 through December 31, 1986.[6] Because the initial review period would be 15 months rather than the two years of subsequent review periods, the Commission expanded the "buffer"[7] that would be used during this initial monitoring period to determine whether the prescription had been violated.[8] Carriers were given notice that a 13.10 percent level of earnings would be the maximum allowable rate of return on overall interstate earnings and 13.25 percent would be the maximum allowable return for any access service category.[9]

4. In September 1989, Allnet filed seven formal complaints[10] against the defendants alleging violations of the Commission's rate of return prescription.[11] In addition, Allnet reserved the right to file supplemental complaints for damages as provided for in Section 1.722 of the Commission's rules[12] because it could not determine the precise amount of damages it suffered at the time its complaints were filed. The majority of defendants filed answers and motions to dismiss.[13] On June 1, 1992, the Common Carrier Bureau (Bureau) released an order establishing further discovery and briefing schedules for these proceedings.[14] Pursuant to the *Discovery Order*, the parties submitted their initial briefs and reply briefs setting forth their respective claims and arguments.[15]

III. DISCUSSION

A. Liability for Damages

1. Contentions of the parties

5. Allnet alleges that the rates it paid for certain of the defendants' interstate access services during the period from October 1, 1985 through December 31, 1986 were unjust and unreasonable in violation of Section 201(b) of

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[6] *See* Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985) (*Phase I Order*), *on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,033 (Apr. 1, 1986) (*Phase I Reconsideration*), *on further reconsideration*, 2 FCC Rcd 190 (1987). *See also* Procedures and Methodologies to Establish Reporting Requirements, CC Docket No. 86-127, FCC 86-514 (released Dec. 3, 1986), 52 Fed. Reg. 273 (Jan. 5, 1987).

[7] *See MCI Liability Order*, 5 FCC Rcd at 217:

> ... the Commission established both an authorized rate of return and a 'spread' or 'buffer' above that return for use in proceedings relating to the enforcement of the prescription. In other words, the authorized return would be employed in computing tariff rates; the spread, or buffer, would be used in combination with the authorized return 'to determine whether a rate of return prescription has been violated.' [footnote omitted]

[8] *Phase I Order*, 50 Fed. Reg. at 41,352 (para. 21).

[9] 47 C.F.R. § 65.701(b).

[10] Due to the similarity of the issues and arguments raised by the parties, the complaints have been consolidated for disposition. These complaints were held in abeyance by the Commission pending resolution of a court remand in *Illinois Bell Tel. Co. v. FCC*, 911 F.2d 776 (D.C. Cir. 1990) (*Illinois Bell v. FCC*). *See* Allnet Communication Services, Inc. v. The Diamond State Telephone Company, *et al.*, 6 FCC Rcd 645 (Com.Car.Bur. 1991) (*Abeyance Order*). Allnet filed an Application for Review (Application) of the *Abeyance Order* on March 7, 1991. Oppositions to the application for review were filed by the defendant LECs. Allnet filed a reply. The Commission acted on the remand in October 1991. *See* Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, Decision on Remand, 7 FCC Rcd 296 (1991), *appeal docketed sub nom. Illinois Bell Tel. Co., et al. v. FCC*, No. 90-1020 (D.C. Cir. Jan. 11, 1991). On December 13, 1991, the Enforcement Division of the Common Carrier Bureau released an order that reactivated the instant cases. *See* Order, 6 FCC Rcd 7289 (Com.Car.Bur. 1991). That action makes Allnet's Application moot and, accordingly, we dismiss the Application. In addition, Michigan Bell and Wisconsin Bell filed motions on October 11, 1990 requesting, among other things, that the complaints against them be held in abeyance pending the Commission's resolution of the remand in *Illinois Bell v. FCC*. The Commission's action on the remand as well as actions we take herein have made those motions moot and, accordingly, they are dismissed.

[11] Allnet reached a negotiated settlement with one of the defendants and that proceeding was dismissed on joint motion of the parties to that proceeding. *See* Allnet Communication Services, Inc. v. Southwestern Bell Telephone Company, 7 FCC Rcd 5583 (Com.Car.Bur. 1992).

[12] 47 C.F.R. § 1.722.

[13] Pacific Bell filed an answer, but did not file a motion to dismiss. Wisconsin Bell and Michigan Bell also filed replies. Pacific Bell filed a Motion for Leave to File Cover Sheet, Summary and Table of Contents on November 13, 1989. Pacific Bell's unopposed Motion for Leave is granted.

[14] Allnet Communications Services, Inc. v. The Diamond State Telephone Company, *et al.*, 7 FCC Rcd 3373 (Com.Car.Bur. 1992) (*Discovery Order*). Allnet and Bell Atlantic served interrogatories on each other to which each responded on July 1, 1992. Allnet and Wisconsin and Michigan Bell served interrogatories on each other to which they responded on July 1, 1992. Wisconsin and Michigan Bell filed a Motion to Serve Request for Production of Documents (accompanied by a Request for Production of Documents) (Motion), which Allnet opposed. While there is disagreement over the calculation of damages, Allnet and Ameritech do not dispute the underlying amounts (the amounts billed to Allnet) upon which their damages calculations are based. Accordingly, we dismiss Ameritech's Motion. Allnet filed a Motion to Strike Ameritech's interrogatories, motion to serve request for documents, and the accompanying request for production of documents. As we have dismissed Ameritech's Motion, Allnet's motion to strike is moot and is dismissed accordingly. Finally, Ameritech filed a motion to compel Allnet's response to interrogatories. As there is no dispute regarding the amounts billed to Allnet, the motion to compel is moot and is dismissed. Allnet served interrogatories on Pacific Bell to which Pacific Bell responded on July 1, 1992, with a supplemental response filed on July 22, 1992.

[15] Allnet filed briefs for the Bell Atlantic proceedings on July 21, 1992 (Allnet Br.1), the Michigan and Wisconsin Bell proceedings on July 24, 1992 (Allnet Br.2) and the Pacific Bell proceeding on July 21, 1992 (Allnet Br.3). Bell Atlantic filed its brief on July 21, 1992 (Bell Atlantic Br.). Wisconsin and Michigan Bell filed their brief on July 24, 1992 (Ameritech Br.). Pacific Bell filed its brief on July 21, 1992 (Pacific Bell Br.) Allnet filed a corrected reply brief in the Bell Atlantic proceedings on August 7, 1992 (Allnet RBr.1). Allnet filed reply briefs in the Ameritech proceedings on August 6, 1992 (Allnet RBr.2), and in the Pacific Bell proceeding on August 10, 1992 (Allnet RBr.3). Bell Atlantic filed its reply brief on July 31, 1992 (Bell Atlantic RBr.). Wisconsin and Michigan Bell filed their reply brief on August 3, 1992 (Ameritech RBr.). Pacific Bell filed its reply brief on August 10, 1992 (Pacific Bell RBr.).

the Act. Allnet supports its allegations with evidence taken from discovery materials and reports filed with the Commission by the defendants for the 15-month period at issue that show that defendants achieved earnings in excess of the Commission's prescribed rate of return on one or more of the three interstate access categories established for the purpose of enforcing that rate of return prescription.[16]

6. Allnet requests that the Commission declare that the defendants' charges for the period from October 1, 1985 through December 31, 1986 are in violation of the rate of return prescription and Section 201(b) of the Act, and order the defendants to pay damages to Allnet equal to the difference between the amount actually paid by Allnet for interstate access service during the period and the amount that Allnet would have paid if the defendants' charges earned no more than the maximum allowable rate of return, plus interest on this amount from January 1, 1987 at the rate specified by the Commission in the CC Docket No. 84-800 proceeding. Allnet later requested in its briefs that interest be calculated at 15%, the amount it determined to be its cost of money. Allnet also requests that the Commission award it all attorneys fees and costs associated with the preparation and filing of these complaints.

7. The defendants raise a number of issues that have been fully considered by the Commission in the *MCI Orders*. They will be briefly discussed below.[17]

8. Defendants advance a variety of arguments to support their claim that Allnet has failed to state a cause of action under the Act.[18] The defendants make various arguments that Allnet's claims are barred by *American Telephone and Telegraph v. FCC*.[19] Defendants contend that renaming a "refund" as a "damage award" does not cure the inconsistencies the court found with respect to the automatic refund rule and allow the awarding of damages in the instant complaints.[20] Defendants argue that the Commission must consider underearnings in determining whether particular overearnings are in violation of the Act.[21] Additionally, some defendants argue that *AT&T v. FCC* precludes the Commission from finding damages on a category by category basis.[22] Still others argue that it is contrary to *AT&T v. FCC* to find a rate of return violation when overall earnings for interstate access service did not exceed 13.10 percent regardless of access category earnings in excess of 13.25 percent.[23]

9. Defendants also argue that the Commission is engaging in retroactive ratemaking should it order a carrier to make refunds solely because the carrier has exceeded the authorized rate of return.[24] Additionally, defendants argue that a carrier's total earnings have never been held to prove a violation of Section 201(b) of the Act or otherwise create a private cause of action under Section 206-208 of the Act.[25] Ameritech argues that these complaints are

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[16] The interstate access service categories are special access, common line, and switched traffic sensitive. *See* 47 C.F.R. § 65.702 (1990). Allnet states that the monitoring reports recite that for the period October 1, 1985 through December 31, 1986: Diamond State earned a return of 15.65% in the special access category; C&P earned a rate of 13.38% in the switched traffic sensitive category; Wisconsin Bell earned a return of 16.66% in the switched traffic sensitive category; Michigan Bell earned a return of 13.37% in the switched traffic sensitive category; New Jersey Bell earned a return of 14.74% in the switched traffic sensitive category; and Pacific Bell earned a return of 14.51% in the switched traffic sensitive category.

[17] The issues and arguments raised by defendants in response to Allnet's claims are essentially identical. For the sake of convenience and clarity, we will refer to defendants' arguments as if they are part of the same pleading. To the extent that individual defendants raise separate or unique arguments, we will address them separately.

[18] We note that Pacific Bell has raised an issue with respect to the sufficiency of Allnet's complaint. It argues that by incorporating by reference arguments previously made by MCI, Allnet has failed to plead fully and with the specificity required by Section 1.720 of the Commission's rules, 47 C.F.R. § 1.720. *See* Pacific Bell Answer at para. 32. While Allnet could have more fully set forth its position, we note that defendants responded fully to Allnet's complaints and were not prejudiced by the incorporation by reference. Allnet has made *prima facie* cases in these proceedings by filing complaints that contain "facts which, if true, are sufficient to constitute a violation of the Act or Commission order or regulation . . . ." 47 C.F.R. § 1.720(b). *See MCI Liability Order*, 5 FCC Rcd at 221.

[19] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court invalidated the Commission's procedure to enforce its rate of return prescriptions through automatic refunds of carrier overearnings to customers. For a detailed discussion of *AT&T v. FCC, see MCI Liability Order*, 5 FCC Rcd at 221-223. The U.S. Court of Appeals for the Sixth Circuit, relying on *AT&T v. FCC*, vacated a Commission order that dealt with refunds of earnings in excess of the authorized rate of return for the special access category over a period of years in the context of a strategic pricing investigation. *See Ohio Bell Tel. Co. v. FCC*, 949 F.2d 864 (6th Cir. 1991) (*Ohio Bell*). The court primarily relied upon the statement from *AT&T v. FCC* that a rate of return prescription is both a minimum and a maximum prescription. *See AT&T v. FCC*, 836 F.2d at 1390. The Commission has clarified, however, that it does not view a rate of return prescription as both a maximum and a minimum and has stated that

> [o]ur accumulated experience with rate of return prescriptions, and our review of the cost of capital evidence in this proceeding, convince us that there is no such point. * * * We believe there is a substantial gap between an earnings level that is fully adequate to assure attraction of capital on favorable terms, and an earnings level which, if sustained over time, would be confiscatory.

Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, 5 FCC Rcd 7507, 7532 (1990), *appeal docketed sub nom. Illinois Bell Telephone Co., et al. v. FCC*, No. 90-1020 (D.C. Cir. Jan. 11, 1991).

[20] *See, e.g.*, Pacific Bell Br. at 5-8; Ameritech Br. at 21-23.

[21] *See, e.g.*, Bell Atlantic Br. at 3-4; Ameritech Br. at 23-25.

[22] *See, e.g.*, Bell Atlantic Br. at 4. In addition, Ameritech argues that the methodology used to calculate the rates of return shown in their monitoring reports overstates their actual returns. Ameritech Br. at 18-19. We have previously rejected this argument finding that it is an impermissible collateral attack on decisions adopted in proceedings in which the right to review has expired. *MCI Liability Order*, 5 FCC Rcd 227, n.38.

[23] *See, e.g.*, Bell Atlantic Br. at 4.

[24] *See, e.g.*, Bell Atlantic Br. at 2, n.2 citing to Diamond State Motion to Dismiss at 4-5 and n.8.

[25] Pacific Bell Br. at 14-16.

barred because the rates in question were not carrier-initiated rates, but rather the Commission prescribed the rates in effect during the period in question.[26]

10. Each of the defendants argues that all or a portion of Allnet's claims are barred by Section 415 of the Act, which establishes a two-year statute of limitations on the filing of complaints.[27] According to some defendants, Section 415 bars Allnet's complaints at least for rates paid prior to September 18, 1987, two years before the date on which Allnet filed its complaints;[28] others contend that the entire complaint should be barred by the statute of limitations.[29] Allnet argues that it had until September 30, 1989 to file its complaints based on monitoring reports filed by defendants with the Commission on September 30, 1987.[30]

11. Defendants make the additional argument that the decision in *Ohio Bell* issued after the release of the *MCI Liability Order*, requires dismissal of Allnet's complaints.[31] According to the defendants, *Ohio Bell* reaffirms the proposition established in *AT&T v. FCC* that the Commission cannot award damages for carrier overearnings without allowing the carrier to re-coup or off-set underearnings,[32] nor may the Commission award damages on an individual operating company basis without taking into account total company earnings.[33] Defendants contend that these propositions are not narrowly confined to the Commission's ratemaking activities under Sections 204-205 of the Act[34] but "are equally applicable when the Commission decides private complaints for damages under Section 208 of the Act.

12. Allnet counters that the Commission has authority to award damages for rate of return violations under Section 208 of the Act, contrary to defendants' assertions otherwise. Allnet argues that by awarding damages in complaint proceedings, which are not "automatic" and by allowing offsets, the Commission overcomes any concerns raised by *AT&T v. FCC*.[35] In addition, Allnet argues that *Ohio Bell* is not relevant because it is based upon *AT&T v. FCC*.[36] Finally, Allnet contends that defendants misapply case law involving refunds under Section 204 of the Act.[37] Complaints under Section 208 of the Act do not require suspension and accounting orders, Allnet argues.[38]

2. Discussion

13. We have carefully examined the record before us and conclude that the defendants have cited no facts and have made no arguments here that would warrant a ruling contrary to the *MCI Liability Order* and *MCI Damages Order*.

14. *Failure to State a Cause of Action:* In the *MCI Liability Order*, we rejected identical claims and held that *AT&T v. FCC* establishes no precedent that bars an individual complainant from seeking a remedy under Section 208 of the Act for damages based on a carrier's reported overearnings.[39] We stated that

> we are not persuaded by defendants' claims that earning in excess of a prescribed rate of return does not violate that Act or, if it does, that the Commission *is required* to take a carrier's underearnings as well as its overearnings into account in determining whether a violation has occurred.
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> * * * * * * *
>
> We find that a valid prescription bound the defendants to a maximum earnings limitation, and the defendants admit that they earned in excess of that amount during the period in question.[40]

We found further that *AT&T v. FCC* did not govern Section 208 complaint proceedings. The Commission has the authority to order a carrier to pay damages if a complainant meets the burden of establishing both a violation of the Act and the actual injury.[41] In addition, we held that enforcement of a rate of return prescription is not a violation of the rules against retroactive rate making because the obligation being enforced was set prospectively when the prescription was adopted.[42] Defendants have not persuaded us to alter our decision. We have previously rejected Ameritech's argument that the rates in question were "prescribed."[43] We again reject this argument and hold that the rates in question are carrier-initiated and susceptible to claims for damages to the extent such damages can be proved.

15. *Statute of Limitations:* We have previously held that the date of the filing of the final monitoring report is dispositive with regard to the date a complainant discovers the right or wrong or the facts on which such knowledge is

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[26] Ameritech Br. at 13-16.

[27] Section 415 provides, in pertinent part, that "[a]ll complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after . . . ." 47 U.S.C. § 415(b). The term "overcharges" is defined in Section 415 "to mean charges for services in excess of those applicable thereto under the schedules of charges lawfully on file with the Commission." 47 U.S.C. § 415(g).

[28] Pacific Bell Answer at para. 34.

[29] *See, e.g.*, Diamond State Motion to Dismiss at 6-7; C&P Motion to Dismiss at 5-7; Ameritech Br. at 17.

[30] Allnet cites to the Bureau's Show Cause Orders in the MCI proceeding to support its argument. *See, e.g.*, MCI Telecommunications Corp. v. Michigan Bell Tel. Co., Order to Show Cause, 4 FCC Rcd 6099, 6101, n.8. (Com.Car.Bur. 1989). This holding was subsequently adopted by the Commission. *See MCI Liability Order*, 5 FCC Rcd at 224-25.

[31] Pacific Bell Br. at 6-8; Bell Atlantic Br. at 6-7; and Ameritech Br. at 11-13.

[32] *See, e.g.*, Bell Atlantic Br. 6-7.

[33] Ameritech Br. at 12.

[34] 47 U.S.C. §§ 204-205.

[35] Allnet RBr.2 at 4.

[36] *Id.* at 4, n.10.

[37] *Id.* at 5.

[38] *Id.*

[39] *MCI Liability Order*, 5 FCC Rcd at 222-23.

[40] *Id.* at 223 [emphasis in the original; footnotes omitted].

[41] *Id.*

[42] *Id.* at 222.

[43] *Id.* at 224.

chargeable as a matter of law.[44] Defendants have made no argument that, persuades us to alter this holding. Section 415 does not bar Allnet's complaints.

16. *AT&T v. FCC and Ohio Bell:* We disagree with the defendants' claim that *Ohio Bell* and *AT&T v. FCC* compel us to dismiss Allnet's complaints. As we emphasized in the *MCI Liability Order*, automatic refunds and refunds ordered under Section 204 of the Act are different from individual actions for damages under Section 208. Unlike the automatic refund mechanism in *AT&T v. FCC* or the refund procedure in *Ohio Bell*, both of which resulted from rulemaking proceedings initiated at the Commission's discretion, individual actions for damages under Section 208 are initiated by private parties seeking damages for injuries to themselves; those private parties have the burden of establishing both a violation of the Act and actual injury.[45] The courts in *AT&T v. FCC* and *Ohio Bell* did not discuss private complaints for damages; they did not invalidate private actions for damages; and their holdings are not applicable to the different separately authorized complaint procedure set forth in Sections 206-209. Accordingly, those decisions do not require us to depart from our holding in the *MCI Liability Order* that defendants have violated the Communications Act by earning in excess of a valid rate of return prescription, thereby making their rates unjust and unreasonable under Section 201 of the Communications Act and themselves liable for damages to the extent a complainant can establish that it was damaged as a result of the violation.[46]

B. Damages, Interest, and Attorney's Fees Claims

1. Damages

a. Contentions of the Parties

17. As referenced above, Allnet's damages claims rest primarily on the contention that the proper measure of the damages it incurred as a result of defendants' violations is the difference between the amount it actually paid defendants for interstate access services during the October 1, 1985 through December 31, 1986 period and the amount it would have paid if the defendants' rates had produced earnings that did not exceed the Commission's prescribed rate of return. In the *Discovery Order*, the Bureau stated that it tended to agree, in principle, that a possible measure of the damages stemming from defendants' rate of return violations could be that difference.[47] The Bureau was not persuaded on the record before it, however, that a damages determination based solely on such a measure necessarily reflected actual damages incurred by Allnet.[48] The defendants were invited to submit evidence that could serve to mitigate or otherwise reduce Allnet's damages claims. Specifically, the Bureau stated that evidence that would show that Allnet's share of excessive earnings realized in a particular access category by a defendant could be offset or otherwise reduced due to facts and circumstances surrounding Allnet's purchase of other interstate access services from such defendant for the relevant monitoring period might be relevant.[49]

18. Allnet states that it should be awarded damages of $48,000 from Bell Atlantic,[50] $327,000 from Ameritech,[51] and $358,000 from Pacific Bell.[52] Allnet states that its calculations include offsets for defendants' underearnings to the extent that Allnet purchased services from defendants from the categories in which there were underearnings as well as interest at 15%, the rate Allnet determined to be its cost of money.[53] Although Allnet does not specifically describe its method in computing their damages, it does provide a chart providing its figures and its conclusions.[54] To derive the stated amounts, Allnet first calculated for each access service category, the amount that a defendant's earnings exceeded the rate of return prescription of 12.75% plus the .40% buffer. This was accomplished by multiplying the defendants' rate base by the difference between the defendants' actual rate of return (from the defendants' FCC Forms 492) and the maximum allowable rate of return (including the .40% buffer) and then multiplying that amount by .8.[55] Next, Allnet computes its percentage share of the defendants' revenues for each access service category by dividing the amount billed per category to Allnet by defendants' revenues per access category.[56] Using this percentage, Allnet then computes its monetary share of the overearnings in a particular access category by multiplying Allnet's percentage of the defendants' revenues by the amount of overearnings for a particular category (which was previously computed).[57] Next, Allnet adds to this amount defendants' taxes for the period

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[44] In the *MCI Liability Order*, we stated that

> the defendants filed the rate of return monitoring reports which...were developed by the Commission for several purposes, including making information about carrier earnings public[ly] available. Moreover, the monitoring reports relied on by MCI in its complaints were specifically designated by the Commission as a "final" and conclusively binding determination of a carrier's earnings.

5 FCC Rcd at 225. We note further that, we have held that Section 415(e) is inapplicable to the type of complaints we deal with herein. Section 415(e) concerns a carrier's liability to its customers for failure to transmit a message in accordance with its common carrier obligations. The instant complaints deal with the lawfulness of defendants' rates, not defendants' transmissions or obligations to transmit messages properly. *See MCI Reconsideration Order*, 5 FCC Rcd at 3464.

[45] *See MCI Liability Order*, 5 FCC Rcd at 222-23, para. 55.

[46] *Id.* at 226, para. 86.

[47] *Discovery Order*, 7 FCC Rcd at 3374, para. 6.

[48] *Id.*

[49] *Id.*

[50] Allnet RBr.1 at 2. This amount is based on overearnings of $38,000 from New Jersey Bell before cost of money effects and offsets. Allnet Br.1 at 3.

[51] Allnet RBr.2 at 1.

[52] Allnet RBr.3 at 1.

[53] We note that in its complaints Allnet requested interest at the rate specified in CC Docket No. 84-800.

[54] *See, e.g.*, Allnet RBr.1 at Revised Opening Brief Exhibits C-1 through C-6.

[55] *See, e.g.*, Allnet RBr.1 at Revised Opening Brief Exhibit C-1, line 4.

[56] *Id.* at line 7.

[57] *Id.* at line 8.

at issue.[58] Finally, Allnet adds to its share of overearnings (including interest) a 15% "cost of money" charge in place of the interest rate for the monitoring period;[59] to derive the total damages it alleges should be awarded to it.[60]

19. The defendants challenge Allnet's damages claims on a number of grounds, raising several arguments that were previously considered and rejected by the Commission in the *MCI Liability Order* and *MCI Damages Order*. Defendants contend that by simply basing its damages claims on a calculation of Allnet's prorated share of category-level overearnings, Allnet asks the Commission to award it damages in the same amounts it would have received under the automatic refund rule invalidated by the court in *AT&T v. FCC*.[61] The defendants maintain that such a result is expressly precluded by *AT&T v. FCC*. The defendants add that the decision in *Ohio Bell* precludes an award of damages based solely on category level overearnings. Defendants also contend that the decision in *Illinois Bell* precludes an award of damages for past overearnings because that decision limits the Commission to ordering prospective relief under Section 205 of the Act.[62]

20. Defendants next contend that, even if *AT&T v. FCC* and *Ohio Bell* do not preclude Allnet's damages claims, the claims still fail because Allnet's complaints do not establish a valid cause of action. According to defendants, to pursue a damages claim, Allnet must first show that the defendants charged unjust and unreasonable rates for interstate access services during the period in question, not that defendants' rates produced excessive returns in individual service categories.[63] Moreover, defendants argue, Section 206 of the Act[64] requires Allnet to prove injury, causation, and the amount of damages in addition to establishing a violation of the Act.[65] Defendants maintain that by simply referencing defendants' earned rates of return for individual access service categories, Allnet has not only failed to allege any facts that would establish that defendants' rates were unjust and unreasonable during the period in question but has also failed to show that it sustained actual damage as a result of those rates.[66]

21. For its part, Pacific Bell argues that Allnet's claim for damages is flawed because Allnet simply assumes that lower rates would have produced lower earnings and offers no probative evidence to show what a reasonable rate would have been or to otherwise support its damages claims.[67] Pacific Bell argues that Allnet would receive a windfall if it has passed the "overcharges" on to its customers and is now awarded damages.[68] Pacific Bell argues that had its access charges to Allnet been lower in 1985-1986, it is almost certain that Allnet's rates to its customers would have been lower.[69] Pacific Bell cautions the Commission to look at the "backdrop of the practical consequences" thereof and ensure that any decision granting Allnet "refunds" is equitable under the circumstances.[70] Pacific Bell further argues that, should the Commission award damages to Allnet, the Commission should order Allnet to pass the damages through to its end users in the form of a rate reduction.[71] Finally, Pacific Bell argues that any award of

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[58] *Id.* at line 10.

[59] Allnet claims this cost of money because of the loss of the use of the overearned portion retained by the defendants. *See, e.g.*, Allnet Br.1 at 4.

[60] Allnet RBr.1 at Revised Opening Brief Exhibit C-1, line 13.

[61] *See, e.g.*, Pacific Bell Br. at 6; Ameritech Br. at 21. In addition, defendants contend that *Ohio Bell* makes clear that it was the end result of the automatic refund mechanism, not the mechanism itself, that was unlawful. *See, e.g.*, Pacific Bell Br. at 7.

[62] *See, e.g.*, Pacific Bell Br. at 10-11; Bell Atlantic Br. at 5-6; Ameritech Br. 21-23.

[63] *See, e.g.*, Pacific Bell Br. at 15.

[64] 47 U.S.C. § 206.

[65] *See, e.g.*, Pacific Bell Br. at 16.

[66] *See, e.g., Pacific* Bell Br. at 16-18. Defendants contend that the principle that Allnet must still prove it was damaged and in what amount was established by the Supreme Court in *Southern Ry. Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 454-55 (1979) (*Seaboard*), in construing relevant sections of the Interstate Commerce Act. The Court stated:

> [O]ur sole concern is the Commission's decision not to investigate under § 15(8)(a) [§ 204], a decision that has only two final consequences. First, the burden of proof with regard to *reasonableness* is placed on the shipper under § 13(1) [§ 208] rather than on the carrier, who would have borne it in a § 15(8)(a) [§ 204] proceeding. (With respect to all other aspects of lawfulness, however, the burden is borne by the shipper in both proceedings.) Second, the shipper's relief, if unlawfulness is proved, is limited under § 13(1) [§ 208] to actual damages rather than the full refund of overcharges available under § 15(8)(a) [§ 204].

Defendants state that this ruling has been found applicable to proceedings under the Communications Act. *See Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221, 1235 n.35 (D.C. Cir. 1980) (*ARINC*), *cert. denied*, 451 U.S. 920 (1981). As we determined in the *MCI Damages Order*, defendants' reliance on these cases is misplaced. *MCI Damages Order* at n.59.

[67] For example, Pacific Bell alleges that had its rates been lower "it is almost a certainty" that Allnet's rates to end users would have been lower also. Pacific Bell Br. at 18. Ameritech also argues that had its rates been lower, Allnet would have been required to pass through the reductions to Allnet's customers. Ameritech Br. at 21.

[68] Pacific Bell Br. at 20.

[69] *Id.* at 18. Pacific Bell cites to numerous newspaper and magazine articles to support this contention.

[70] *Id.* at 19-20, citing to *Las Cruces TV Cable v. FCC*, 645 F.2d 1041 (D.C. Cir. 1981) (*Las Cruces*). In *Las Cruces*, the court upheld, in part, and remanded, in part, a Commission decision requiring refunds under Section 204 of the Act. The court noted that *Las Cruces*

> is the first time that the Federal Communications Commission has attempted to articulate standards governing its award of refunds to customers of a communications common carrier under Section 204 of the Act.

645 F.2d at 1046. Pacific Bell's reliance on *Las Cruces* is unavailing, however, because equitable considerations that may impact a Section 204 investigation are not applicable in individual Section 208 complaint proceedings.

[71] Pacific Bell Br. at 20.

damages to Allnet based on overearnings should be reduced by Pacific Bell's underearnings in the common line category (earnings under 12.75%).[72]

22. Allnet counters that defendants' threshold arguments regarding the effect of the court's ruling in *AT&T v. FCC* have largely been rejected or precluded by the *MCI Liability Order*. According to Allnet, the only injury and causation it need show are the injury and causation arising from its payment of excessive rates for services it purchased from defendants during the relevant period. Allnet maintains that it has shown that defendants charged it rates that produced earnings in excess of the Commission's prescribed rate of return and argues that its damages are the excessive charges that Allnet paid and it is entitled to the full amount of those overcharges.[73] Allnet further claims that defendants' argument that it must flow through any damages awarded here to its customers is a separate issue for Commission determination. Allnet argues that the fact that it may be required to flow through damages to its customers does not provide a basis for defendants to keep their overcharges.[74]

b. Discussion

23. *AT&T v. FCC and Ohio Bell:* The defendants' claims that the holdings in *AT&T v. FCC* and *Ohio Bell* control these proceedings and bar an award of damages to Allnet are without merit for the reasons stated in the *MCI Liability Order* and *MCI Damages Order*. In the liability section above, we again emphasized that the court in *AT&T v. FCC* explicitly acknowledged the Commission's authority to order a carrier to disgorge earnings in excess of a rate of return prescription,[75] finding only the remedy component of the Commission's rate of return prescription (the automatic refund mechanism) to be unlawful.[76] More to the point, we emphasized that "the [*AT&T v. FCC*] opinion does not address Section 208 complaint proceedings nor purport to alter the statutory scheme of the Act or the remedies Congress established therein."[77] Similarly, as we stated in the *MCI Damages Order*, the *Ohio Bell* decision does not expand upon *AT&T v. FCC* and does not address the Commission's authority to award damages in private complaint actions under Section 208 of the Act.[78]

24. We also reject defendants' claim that the decision in *Illinois Bell* somehow leaves the Commission only with Section 205 authority in the face of a violation of our rate of return prescription for the reasons set forth in the *MCI Damages Order*.[79] The *Illinois Bell* decision does not deprive the Commission of authority to award damages for violations of a valid rate of return prescription.

25. *Section 201(b) of the Act:* We turn now to the defendants' contention that Allnet's damages claims must be dismissed because Allnet has failed to prove defendants' rates were unjust and unreasonable within the meaning of Section 201(b) of the Act. These arguments were previously raised by the defendants in the liability phase of this proceeding. In the *MCI Liability Order*, we specifically held that Allnet had met its burden of proof by establishing that the defendants had violated our rate of return prescription "thereby making their rates unjust and unreasonable under Section 201 of the Act."[80] Accordingly, the question before us now is not whether defendants' rates were unjust and unreasonable; rather the questions now are whether the complainant suffered any measurable damage as a consequence of paying rates previously determined by the Commission to be unlawful under Section 201(b).

26. We have previously rejected defendants' claim that, even if Allnet has sustained its burden and shown that defendants' rates were unjust and unreasonable, its damages claims must still fail because judicial precedent compels Allnet to establish what a just and reasonable rate would have been as a prerequisite to pursuing damages claims based on unreasonable rates. In the *MCI Damages Order* we reemphasized[81] the Commission's authority to prescribe and enforce carriers' rates of return, pointed out that the issue in these proceedings is not whether individual rates are unlawful, but whether cumulative rates that produced earnings over and above a prescribed rate of return are unjust and unreasonable, and agreed with the Bureau's determination in the *Discovery Order* that a proper starting point for assessing damages based on violations of a rate of return prescription is to look at the difference between the amount complainant paid for defendants' interstate access services and the amount it would have paid if defendants had charged rates that produced returns within the Commission's prescribed levels.[82] We said, "[i]t is appropriate and consistent with the Commission's rate of return regulatory scheme to inquire as to earnings in excess of prescribed levels for purposes of assessing damages claims."[83] Allnet has shown that it purchased services from defendants at rates that produced earnings over and above the defendants' prescribed levels. We previously determined in the *MCI Liability Order* that a violation of such a prescription constitutes a violation of the Act for which damages may lie.

27. *Damages and Offsets:* The defendants' arguments are devoted primarily to attempting to persuade the Commission that Allnet's damages claims are really claims for refunds governed by equitable considerations. These considerations, according to defendants, militate against any

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[72] *Id.* at 20-21.

[73] Allnet RBr.2 at 7, citing to Hughes Sport Network, Inc., 34 FCC 2d 691 (*Hughes*), *recon. denied*, 38 FCC 2d 1052 (1972) along with the Supreme Court's decision in *Southern Pacific Co. v. Darnell-Taenzer* (*Darnell-Taenzer*). In *Hughes*, the Commission stated that "the imposition of a charge which is unlawful because it is unreasonably high entitles the customer to reparation of the excessive amount...." 34 FCC 2d at 693.

Similarly in *Darnell-Taenzer*, the Court upheld an Interstate Commerce Commission (ICC) order requiring a carrier to pay reparations to a shipper in the amount that the rate charges by the carrier exceeded a rate found reasonable by the ICC.

[74] *See* Allnet RBr.1 at n.20.

[75] *AT&T v. FCC*, 836 F.2d at 1392 ("Thus, as we previously have concluded, the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate of return prescription").

[76] Indeed, the court in *Ohio Bell* recognized the continuing efficacy of our rate of return framework. *See* 949 F.2d at 868.

[77] *MCI Liability Order*, 5 FCC Rcd at 223, para. 56.

[78] *MCI Damages Order* at para. 26.

[79] *Id.* at para. 27.

[80] *MCI Liability Order*, 5 FCC Rcd at 226, para. 86.

[81] For a full discussion of the Commission's authority to prescribe and enforce carriers' rates of return, *see MCI Liability Order*, 5 FCC Rcd at 222-23.

[82] *MCI Damages Order* at para. 29.

[83] *Id.*

award of damages to Allnet based on excessive earnings. The defendants argue, in effect, that the damages Allnet seeks are equivalent to refunds that would have been required under the refund mechanism invalidated by the court in *AT&T v. FCC*. We do not agree. We are concerned here with determining whether a particular customer, which has availed itself of a statutory complaint remedy under Title II of the Act, has sustained any measurable damage that can be traced to defendants' violations of the Act. Although a damages award under Section 208 of the Act might well be equal or substantially similar to a refund ordered under Section 204 of the Act,[84] this does not transform a private complaint action into a public enforcement proceeding subject to broad public interest considerations.

28. As in the *MCI Damages Order*, we find defendants' arguments with respect to "passing-on" equally unavailing. In rejecting this same argument, we said, "[w]hether [complainant] passed on the overcharges or absorbed them does not alter the fact that the defendants overcharged [complainant] in violation of a binding rate of return prescription and must answer for such violations."[85] The issue is not what Allnet has done in response to paying excessive rates, but whether Allnet has been damaged as a result of these excessive rates.[86]

29. Nor can we accept the defendants' related claim that we should require Allnet to flow through any damages it may receive to its end user customers. Sections 206-209 of the Act give private parties the right to file complaints challenging the acts or omissions of carriers and to recover monetary damages resulting from such acts or omissions. Complainants, however, are charged, as Allnet is in the instant case, with the burden of establishing violations of the Act or Commission rule or order and the amount or extent of damage suffered as a consequence of such violations. Accepting defendants' flow through argument would, in effect, transform Allnet's complaints into class action suits on behalf of its customers, a result neither expressly contemplated by nor consistent with the private remedy created under Sections 206-209 of the Act.

30. We have carefully reviewed the arguments and evidence presented by the parties and believe that some offset to the claimed damages amounts is appropriate. In the *MCI Liability Order*, we specifically rejected claims by the defendants that the Commission is required to take a carrier's interstate access underearnings as well as overearnings into account in determining whether a violation of the Act has occurred because this would be at odds with established case law.[87] However, we stated in the *MCI Damages Order* that it is appropriate to consider defendants' underearnings in assessing complainant's damage or injury resulting from defendant's overearnings in a particular monitoring period[88] and rejected the complainant's contention that this approach results in unlawful cross-subsidization.[89] The parties have made no argument which persuades us to alter our holdings.

31. *Bell Atlantic:* We note initially that Allnet concedes that it is not entitled to damages from C&P and Diamond State once offsets are applied. Accordingly, we will confine our discussion to Allnet's claim for $48,000 in damages and interest from New Jersey Bell. Allnet concedes that Bell Atlantic's calculations for switched traffic sensitive access category overearnings are correct except that Bell Atlantic used an inappropriate rate of return number. Allnet contends that Bell Atlantic used a rate of return for 1985-86 based on revenues that it collected after including offsetting effects for refunds of 1978 earnings ordered by the Commission.[90] Allnet contends that Bell Atlantic is asking the Commission to void its refund liability for 1978 by offsetting its 1985-86 overearnings with the amount previously refunded for 1978 overearnings. Bell Atlantic replies that Allnet is attempting to calculate its damages based on rules designed to enforce the Commission's invalidated automatic refund rules further bolstering Bell Atlantic's contention that Allnet is seeking a refund, not damages.[91] Bell Atlantic further contends that Allnet has already received the benefit of the 1978 refund through a reduced common carrier line rate and a recalculation of the rate of return under Allnet's theory would result in double counting and a windfall to Allnet.[92]

32. Allnet further argues that it is entitled to interest at 15% because this percentage is the cost of money to Allnet. Thus applying the cost of money to overearnings, Allnet contends that, prior to offsets, it is entitled to $77,000 from New Jersey Bell.[93] After applying offsets, Allnet contends that it should be awarded damages in the amount of $48,000 from New Jersey Bell.[94] In response, Bell Atlantic argues that Allnet's application of interest to overearnings before applying offsets is illogical. Rather, the amounts Allnet overpaid should first be offset with the amounts

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[84] *See Seaboard*, 442 U.S. 444, 455, n.8:

> If a shipper proves a rate is unreasonable and that he was damaged in the full amount he was overcharged, the outcome of a § 13(1) [§ 208] proceeding will be no different than that of a § 15(8)(a) [§ 204] proceeding in which the carrier fails to establish the reasonableness of the rate.

[85] *MCI Damages Order* at para. 31.

[86] While defendants have asserted that lower charges to complainant would have resulted in lower charges to complainant's customers, they have provided no persuasive evidence in support of this contention. Pacific Bell, for example, relies solely on press clippings that purportedly show that Allnet's rates to its customers would have been affected by changes in defendants' rates. Pacific Bell Br. at 18-19. These clippings do not, however, establish, as a matter of law, that complainant, in fact, passed on defendants' overcharges to its customers.

[87] *MCI Liability Order*, 5 FCC Rcd at 223, citing *Nader v. FCC*, 520 F.2d 182, 201 (D.C. Cir. 1975). *See also New England Tel.& Tel. Co. v. FCC*, 826 F.2d 1101 (D.C. Cir. 1987), *cert. denied*, 109 S. Ct. 1942 (1989); and *AT&T v. FCC*.

[88] *MCI Damages Order* at para. 38.

[89] *Id.* at para. 39.

[90] Allnet contends that Bell Atlantic is using the 11.75% rate of return reported on line 5 of the Form 492 for New Jersey Bell rather than the 12.04% rate of return reported on line 8 of that monitoring report. Allnet Br.1 at 3.

[91] Bell Atlantic Br. at 4.

[92] *Id.*

[93] Allnet RBr.1 at corrected Exhibits C-1 -- C-6.

[94] Allnet RBr.1 at 10.

Allnet underpaid and interest should be applied to the net overpayment. Bell Atlantic contends that Allnet's underpayments exceed its overpayments.[95]

33. We agree with Allnet that Bell Atlantic used an incorrect rate of return in calculating its underearnings for the common line category. However, we find that offsets must be applied prior to the assessment of any interest on the resulting damages. We will award damages to Allnet from New Jersey Bell in the amount of $9,000.[96] In reaching this amount, we have accepted Allnet's calculation of undercharges for the common line access category of $28,000. The parties do not dispute the overcharge to Allnet of $38,000 for the switched traffic sensitive category or the undercharge to Allnet of $1,000 for the special access category.

34. *Ameritech:* We note that there is no disagreement between Allnet and Ameritech concerning the amounts billed to Allnet for the 1985-1986 monitoring period. Ameritech contends, however, that Allnet uses incorrect tax rates in its calculations that result in an overstatement of the tax gross up amounts.[97] Ameritech states that it has provided the accurate effective tax rate in its damages calculations.[98] Further, Ameritech argues that Allnet is in error when it applies interest to overpayments prior to offsetting underpayments.[99] Finally, Ameritech argues that underearnings should be calculated at 13.25% rather than at the 12.75% used by Allnet because the Commission allowed a maximum 13.25% rate of return on category earnings.

35. We will credit Allnet's calculations of both Ameritech's underearnings and overearnings on the category level.[100] We note that Ameritech has attempted to lower the total revenues in each category by relying on company records in its calculations rather than using the revenues reported for each category on its Forms 492. We will not accept Ameritech's late attempt to modify the revenues reported on its Forms 492. In addition, we note that the tax rates used by Allnet in its corrected calculations in its reply briefs and the tax factor used by Ameritech are equivalent, though they are expressed differently. We agree that interest may not be assessed until undercharges are offset against overcharges to determine the amount of damages.

36. We will award damages to Allnet from Michigan Bell in the amount of $14,000.[101] In reaching this amount, we have accepted Allnet's calculation of overcharges in the switched traffic sensitive access category of $19,000 and undercharges for the special access category of $5,000. We will award damages to Allnet from Wisconsin Bell in the amount of $28,000.[102] In reaching this amount, we have accepted Allnet's calculation of overcharges in the switched traffic sensitive access category of $98,000 and undercharges for the common line category of $21,000 and the special access category of $49,000.

37. *Pacific Bell:* Allnet does not dispute Pacific Bell's calculation of Allnet's overpayment of $303,000 for switched traffic sensitive access services.[103] However, Allnet contends that Pacific Bell erred in calculating Allnet's share of underearnings in the common line access category at $164,000. Allnet contends that its market share in that category has been overstated by Pacific Bell and that, at its correct market share, only $101,000 in undercharges is attributable to Allnet. Pacific Bell counters that Allnet confuses common line revenues, which include revenues from end user common line charges with the carrier common line charges.[104] Pacific Bell contends that Allnet's share of its underearnings in the common line category should be based on Allnet's share of carrier common line charges only, which benefitted only the interexchange carriers who paid that charge, rather than on overall common line revenues.[105]

38. We will not accept Pacific Bell's attempt to increase Allnet's share of Pacific Bell's common line underearnings. Pacific Bell's earned rate of return for that category is based on overall common line revenues, not just upon a component of those revenues. Accordingly, we award damages to Allnet from Pacific Bell in the amount $127,000.[106] The parties do not dispute the overearnings of $303,000 in the switched traffic sensitive access category and the offset of $75,000 for a refund for that category made by Pacific Bell in 1988. We have accepted Allnet's calculation of

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[95] Bell Atlantic provides the following calculation for New Jersey Bell:

$ 38,000 overpayment

(40,000) (underpayment)

(2,000) (net)

[96] As explained in para. 33, this amount is calculated as follows:

$ 38,000 (overcharges - switched traffic sensitive category)

- 28,000 (undercharges - common line category)

- 1,000 (undercharges - special access category)

$ 9,000

[97] Ameritech RBr. at 4.

[98] *Id.*

[99] *Id.*

[100] These calculations are contained in Revised Allnet Initial Brief Exhibits C-1 through C-4 attached to Allnet's Reply Brief.

[101] As explained in para. 36, this amount is calculated as follows:

$ 19,000 (overcharges - switched traffic sensitive category)

- 5,000 (undercharges - special access category)

$ 14,000

[102] As explained in para. 36, this amount is calculated as follows:

$ 98,000 (overcharges - switched traffic sensitive category)

- 21,000 (undercharges - common line category)

- 49,000 (undercharges - special access category)

$ 28,000

[103] Allnet Br.3 at 3.

[104] Pacific Bell RBr. at 2.

[105] Pacific Bell RBr. at 3.

[106] As explained in para. 38, this amount is calculated as follows:

$ 303,000 (overcharges - switched traffic sensitive category)

- 101,000 (undercharges - common line category)

- 75,000 (refund - switched traffic sensitive category)

$ 127,000

$101,000 as its share of underearnings in the common line access category and allow the offset of this amount against overearnings.

2. Interest on Damages

a. Contentions of the Parties

39. Defendants' final claim is that Allnet is not entitled to prejudgment interest should the Commission award damages to Allnet. Defendants ground their claim on their contention that the amount of damages has been sharply disputed in these proceedings.[107] In addition, defendants claim that interest would penalize them even though they have not been accused of deliberate wrongdoing and interest is not necessary to make Allnet whole.[108] Defendants contend that while the Commission may award interest under Section 204 of the Act, there is no provision for the award of interest under Section 206 of the Act. Because we cannot lawfully grant Allnet a refund, defendants argue, we may not award interest.[109]

40. Allnet disputes defendants' claims that it is not entitled to prejudgment interest at 15% in connection with any ultimate damages award. Allnet contends that an award of prejudgment interest is appropriate in the instant case because it is typically awarded in overcharge cases under the Act in order to make the injured party whole.

b. Discussion

41. Defendants' claim that the Commission lacks the requisite authority to award interest in a Section 208 common carrier complaint proceeding has no merit. Although an award of interest does not fall squarely within the ambit of Section 208 of the Communications Act, our authority under Sections 4(i) and other sections of the Act to award interest in a common carrier complaint case is well established.[110] In deciding whether to award interest in a particular common carrier complaint case we are generally guided by federal court practice, where the award of prejudgment interest "... is a matter left to the sound discretion of the trial court."[111] The award of interest in a common carrier complaint case is thus guided by considerations of fairness. Applying this standard, we are persuaded that an award of interest is appropriate in this case. Allnet was effectively deprived of the use of the excessive amounts it paid to defendants as a result of defendants' unlawful rates while defendants, on the other hand, enjoyed the beneficial use for a substantial period of time of funds to which Allnet rightfully has a claim. We are persuaded that interest is required not only to effect a full and fair remedy for Allnet, which paid rates higher than it would have paid had defendant earned within the prescribed level, but also to avoid any unjust enrichment of defendant stemming from its charging rates that we have determined to be unjust and unreasonable under Section 201(b) of the Act.[112] We conclude that interest should be computed at the IRS rate for tax refunds.[113] In addition, we find that interest should begin to accrue from January 1, 1987, the day after which the 1985-1986 monitoring period ended. At that point, defendants were subject to the earnings limitations of a new monitoring period. Accordingly, we award interest calculated at the IRS rate for tax refunds [114] from defendants to Allnet from January 1, 1987 until the date of full payment to Allnet.

2. Attorney's Fees

42. We note that Allnet requested in its complaints that it be awarded attorney's fees and costs in these proceedings. In light of prior Commission decisions, we cannot award attorney's fees or costs to Allnet.[115]

IV. CONCLUSION

43. We have carefully reviewed the extensive record before us and have found, to the extent indicated here, that complainant is entitled to an award of damages, plus accumulated interest on such damages amount, for New Jersey Bell Telephone Company's, Wisconsin Bell, Inc.'s, Michigan Bell Telephone Company's, and Pacific Bell Telephone Company's violations of our rate of return prescription for the 1985-1986 monitoring period.

V. ORDERING CLAUSES

44. Accordingly, IT IS ORDERED, pursuant to Section 4(i), 4(j), 201, 206, 207, 208 and 209 of the Communications Act, as amended, 47 U.S.C. §§ 4(i), 4(j), 201, 206, 207, 208 and 209, that the above-captioned complaints filed by Allnet Communication Services, Inc. ARE GRANTED to the extent discussed above and otherwise ARE DENIED.

45. IT IS FURTHER ORDERED that New Jersey Bell Telephone Company SHALL PAY to Allnet Communication Services, Inc. the sum of $9,000 (Nine thousand dol-

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[107] *See, e.g.*, Pacific Bell Br. at 19.

[108] *See, e.g.*, Bell Atlantic Br. at 12-13.

[109] *See, e.g.*, Bell Atlantic Br. 11-12; Ameritech Br. at 25-26.

[110] *See* MCI Telecommunications Corp. v. American Tel. & Tel. Co., *et al.*, 94 FCC 2d 332, 343-46 (1983).

[111] *United States v. California Board of Equalization*, 650 F.2d 1127, 1132 (9th Cir. 1981), *aff'd*, 456 U.S. 901 (1982), *reh'g denied*, 456 U.S. 985 (1982).

[112] *See New England Tel. & Tel. Co. v. FCC*, 826 F.2d 1101, 1113 (D.C. Cir. 1987), *cert. denied*, 109 S. Ct. 1942 (1989) (carriers may reasonably be required "to pay full interest for earnings they had no right to retain in the first place.").

[113] We believe that the rationale adopted by the Commission for applying the IRS rate in pole attachment complaint proceedings under Section 204 of the Act, 47 U.S.C. § 204, is equally applicable here. In Teleprompter of Fairmont v. C&P of West Virginia, 79 FCC 2d 232 (1980), the Commission stated:

> As a matter of fairness, we believe that the rate of interest applied in a pole attachment complaint proceeding should be readily available, easily applied, and periodically revised to reflect changes in borrowing costs. In light of these considerations, we find the interest rate for federal tax refunds and additional tax payments suitable for use in this type of proceeding. This rate appears in a variety of easily obtained official and commercial publications, and is revised on a regular basis.

79 FCC 2d at 238 [footnote omitted].

[114] The applicable IRS rates are set forth in Appendix A.

[115] *Turner v. FCC*, 514 F.2d 1354 (D.C. Cir. 1975).

lars) within 60 days after the release date of this Memorandum Opinion and Order; that Wisconsin Bell, Inc. SHALL PAY to Allnet Communication Services, Inc. the sum of $14,000 (Fourteen thousand dollars) within 60 days after the release date of this Memorandum Opinion and Order; that Michigan Bell Telephone Company SHALL PAY to Allnet Communication Services, Inc. the sum of $28,000 (Twenty-eight thousand dollars) within 60 days after the release date of this Memorandum Opinion and Order; and that Pacific Bell Telephone Company SHALL PAY to Allnet Communication Services, Inc. the sum of $127,000 (One hundred twenty-seven thousand dollars) within 60 days after the release date of this Memorandum Opinion and Order.

46. IT IS FURTHER ORDERED that New Jersey Bell Telephone Company, Wisconsin Bell, Inc., and Michigan Bell Telephone Company SHALL PAY to Allnet Communication Services, Inc. interest on the damages awarded here at the IRS rates set forth in Appendix A from January 1, 1987 until the date full payment is made.

47. !T IS FURTHER ORDERED that the Motion for Leave to File Cover Sheet, Summary and Table of Contents filed on November 13, 1989 by Pacific Bell Telephone Company IS GRANTED.

48. IT IS FURTHER ORDERED that the Motion to Dismiss filed by The Diamond State Telephone Company on November 2, 1989 IS DISMISSED; the Motion to Dismiss filed by The Chesapeake and Potomac Telephone Companies on November 2, 1989 IS DISMISSED; the Motion to Dismiss filed by Wisconsin Bell, Inc. on November 2, 1989 IS DISMISSED; the Motion to Dismiss filed by Michigan Bell Telephone Company on November 2, 1989 IS DISMISSED; and the Motion to Dismiss filed by New Jersey Bell Telephone Company on November 2, 1989 IS DISMISSED.

49. IT IS FURTHER ORDERED that the Motion filed on October 11, 1990 by Wisconsin Bell, Inc. IS DISMISSED; and the Motion filed on October 11, 1990 by Michigan Bell Telephone Company IS DISMISSED.

50. IT IS FURTHER ORDERED that the Motion to Serve Request for Production of Documents filed on June 11, 1992 by Wisconsin Bell, Inc. and Michigan Bell Telephone Company IS DISMISSED.

51. IT IS FURTHER ORDERED that the Motion to Strike filed on July 1, 1992 by Allnet Communication Services, Inc. IS DISMISSED.

52. IT IS FURTHER ORDERED that the Motion to Compel Response by Allnet filed on July 22, 1992 by Wisconsin Bell, Inc. and Michigan Bell Telephone Company IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Effective Period	Rate	Internal Revenue Service Citation
01/01/87 - 03/31/87	8%	Rev.Rul. 146, 1986-2 C.B. 208
04/01/87 - 06/30/87	8%	Rev.Rul. 87-23, 1987-13 I.R.B. 46
07/01/87 - 09/30/87	8%	Rev.Rul. 87-62, 1987-29 I.R.B. 10
10/01/87 - 12/31/87	9%	Rev.Rul. 87-87, 1987-36 I.R.B. 8
01/01/88 - 03/31/88	10%	Rev.Rul. 87-131, 1987-50 I.R.B. 6
04/01/88 - 06/30/88	9%	Rev.Rul. 88-17, 1988-10 I.R.B. 6
07/01/88 - 09/30/88	9%	Rev.Rul. 88-50, 1988-25 I.R.B. 39
10/01/88 - 12/31/88	10%	Rev.Rul. 88-86, 1988-41 I.R.B. 1
01/01/89 - 03/31/89	10%	Rev.Rul. 88-105, 1988-51 I.R.B. 4
04/01/89 - 06/30/89	11%	Rev.Rul. 89-36, 1989-1 C.B. 309
07/01/89 - 09/30/89	11%	Rev.Rul. 89-69, 1989-1 C.B. 310
10/01/89 - 12/31/89	10%	Rev.Rul. 89-99, 1989-2 C.B. 256
01/01/90 - 03/31/90	10%	Rev.Rul. 89-125, 1989-2 C.B. 257
04/01/90 - 06/30/90	10%	Rev.Rul. 90-19, 1990-1 C.B. 186
07/01/90 - 09/30/90	10%	Rev.Rul. 90-47, 1990-1 C.B. 187
10/01/90 - 12/31/90	10%	Rev.Rul. 90-71, 1990-35 I.R.B. 4
01/01/91 - 03/31/91	10%	Rev.Rul. 90-94, 1990-46 I.R.B. 16
04/01/91 - 06/30/91	9%	Rev.Rul. 91-20, 1991-11 I.R.B. 1
07/01/91 - 09/30/91	9%	Rev.Rul. 91-33, 1991-21 I.R.B. 1
10/01/91 - 12/31/91	9%	Rev.Rul. 91-50, 1991-37 I.R.B. 1
01/01/92 - 03/31/92	8%	Rev.Rul. 91-65, 1991-51 I.R.B. 1
04/01/92 - 06/30/92	7%	Rev.Rul. 92-21, 1992-14 I.R.B. 14
07/01/92 - 09/30/92	7%	Rev.Rul. 92-44, 1992-24 I.R.B. 86
10/01/92 - 12/31/92	6%	Rev.Rul. 92-77, 1992-38 I.R.B. 12

Before the
Federal Communications Commission
Washington, D.C. 20554

In Re

Schuykill Mobile Fone, Inc.

Notice of Apparent Liability for Forfeiture
Penalty for Station KNKI661 in the Public Land Mobile Service at Trevorton, Pennsylvania

File No. 316MS0010

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: February 18, 1993; Released: February 25, 1993

By the Chief, Mobile Services Division:

1. On August 20, 1986, the Commission granted an authorization to Schuykill Mobile Fone, Inc. (Schuykill) to operate on frequency 454.375 MHz at Trevorton, Pennsylvania. The expiration date of the authorization was January 17, 1987. On July 21, 1992, Schuykill filed FCC Form 489, Notification of Status of Facilities, requesting reinstatement. The FCC Form 489 included a statement notifying the Commission that construction had been completed and operation had commenced.

2. Section 22.9(b)(1) of the Commission's Rules states:

> *Notification of status of facilities.* (FCC Form 489). When construction has been completed in accordance with the radio station authorization, the licensee shall so notify the Commission using Form 489. Licensees can commence service the day Form 489 is placed in the mail to the FCC.

Therefore, because Schuykill commenced operation without timely filing FCC Form 489 with the Commission, it is in apparent violation of Section 22.9(b)(1).

3. Section 503(b) of the Communications Act states in pertinent part:

> Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection, to have--
>
> (B) willfully or repeatedly failed to comply with any of the provisions of this chapter or of any rule, regulation, or order issued by the Commission under this chapter...shall be liable to the United States for a forfeiture penalty.

We find that Schuykill's failure to file a Form 489 until July 21, 1992, constitutes willful and repeated conduct within the terms of the statute.[1]

4. Pursuant to our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991) *(Policy Statement), recon. denied*, 7 FCC Rcd 5339 (1992), *petition for review pending sub nom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992), the base forfeiture amount for failing to file required forms is $30,000. The forfeiture is being adjusted downward by $15,000 because failing to file an FCC Form 489 is a relatively minor violation, and by an additional $9,000 because Schuykill voluntarily disclosed its failure to file the FCC Form 489. Consequently, a $6,000 forfeiture is assessed.

5. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. Section 503(b) and Section 1.80 of the Commission's Rules, 47 C.F.R. Sec. 1.80, IT IS ORDERED that Schuykill Mobile Fone, Inc. IS APPARENTLY LIABLE FOR A FORFEITURE in the amount of Six Thousand Dollars ($6,000) for willful and repeated violations of the aforementioned rule. The amount specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934, as amended.

6. Payment of the forfeiture may be made by mailing a check or similar instrument, noting on the payment the File Number of the above captioned proceeding, to the Commission within thirty (30) days of the release date of this order, payable to the order of the Federal Communications Commission to: Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482.

7. A copy of this Notice is being sent to Schuykill Mobile Fone, Inc., 210 West Market Street, Pottsville, Pennsylvania 17901, by Certified Mail, Return Receipt Requested.

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[1] §Section 312(f)(1) of the Communications Act provides:

> The term "willful", when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States.

This definition applies to Section 503(b) of the Communications Act. *See Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

Section 312(f)(2) of the Communications Act provides:

> The term "repeated", when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.

This definition applies to Section 503(b) as well. *See* H. R. Rep. No. 97-765, 97th Cong. 2d Sess. 50-51 (1982).

FEDERAL COMMUNICATIONS COMMISSION

John Cimko
Chief, Mobile Service Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

Released: February 25, 1993

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Evergreen Media 8310-MD
Corporation of Chicago AM 92050376
Licensee, Radio Station WLUP(AM)
875 North Michigan Ave., Suite 3750
Chicago, IL 60611

Dear Licensee:

This letter constitutes a NOTICE OF APPARENT LIABILITY FOR A FORFEITURE pursuant to Section 503(b) of the Communications Act of 1934, as amended.

On March 3, 1992, the Commission asked you to respond to allegations that Radio Station WLUP(AM), Chicago, IL, may have broadcast indecent language in violation of 18 U.S.C. § 1464. Specifically, it was alleged WLUP(AM)'s broadcast of the January 13, 1991, "Steve and Garry Show," at approximately 5:30 p.m., and WLUP's broadcast of the March 4, 1991, "Kevin Matthews Show," at approximately 11:35 a.m., contained indecent language. (See attached transcripts made from tapes provided by the complainant.)

Pursuant to 47 U.S.C. §§ 312(a)(6) and 503(b)(1)(D), the Commission has statutory authority to take appropriate administrative action when licensees broadcast material in violation of 18 U.S.C. § 1464, which provides criminal penalties for anyone who "utters any obscene, indecent or profane language by means of radio communication."

The Commission has defined indecency as "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." *Infinity Broadcasting Corporation of Pennsylvania*, 2 FCC Rcd 2705 (1987). The United States Court of Appeals for the District of Columbia Circuit has upheld the Commission's authority to restrict the broadcast of indecent material at times when there is a reasonable risk that children may be in the audience. *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988).

In your response dated May 13, 1992, you deny that the material in question is indecent. You also assert that there is not a reasonable risk that unsupervised children were in the audience.

First, we turn to the definition of indecency and whether it may be fairly applied to the broadcasts at issue. As you describe them, the excerpts from the Steve and Garry Show and from the Kevin Matthews Show deal humorously with penis size, using appropriate, inoffensive language which is not shocking, vulgar, or titillating, and in a manner which is not pandering or salacious. You claim that sexual endowment is a pervasive topic of discussion on radio and television, and that although this was not the stated topic of the WLUP broadcasts at issue, the brief excursions into this area were presented in a manner which Chicago's listeners find acceptable under their contemporary community standards.[1]

You further assert that the topics of discussion, and the manner of presentation, are acceptable by contemporary community standards for the broadcast medium. You argue that top ratings and letters of support for the WLUP programming at issue, along with the popularity and pervasiveness of other broadcasts nationwide which more graphically portray sexual subjects, demonstrate that no sanction is warranted in this case. You urge the Commission to consider this evidence of specific popularity and general standards of taste set and accepted by the American public because, although the Commission can "articulate where the line of indecency should be drawn," it "has no constitutional mandate to stand as a bulwark against the tide of ever more explicit programming."

The language in both broadcasts is lewd and vulgar and clearly falls within the definition of broadcast indecency. The subject of penis size is not *per se* taboo, but repeated statements in this connection that "more than a mouthful is a waste"; repeated references to masturbation; graphic descriptions of "flaccid manhood" ("almost like a little rose"; "show Jim how your penis sticks to your balls"); and references to the mutilation of sexual organs, in a context of varied and recurrent references to the penis, are patently offensive descriptions of sexual activities and organs, as measured by contemporary community standards for the broadcast medium. The context does not render them inoffensive. While these excerpts represent only a small portion of the four-hour broadcasts, they dwell in a lewd and vulgar manner on sexual matters for such sufficient lengths of time that the offensive material cannot be characterized as fleeting or isolated in nature.

Your argument about the effect of public opinion polls in the Chicago area is clearly intended to support your contention that the language in these broadcasts is appropriate and inoffensive. We have in the past, however, rejected such arguments in addressing the issue of local versus non-geographical "contemporary community standards" for the broadcast medium as a basis for evaluating the patent offensiveness of broadcast material. *See, e.g., Sagittarius Broadcasting Corporation*, 7 FCC Rcd 6873, 6876 (MMB 1992), *recon. pending*. We see no reason to repeat those arguments here. Therefore, your purported reliance on indicators of popularity and acceptance in Chicago of

[1] You have requested copies of the original complaints so that you may evaluate whether this case involves an unusually sensitive complainant or bias against the station. We will deny your request because the complainant has requested confidentiality and because the complainant's sensibilities or possible biases are not relevant to the Commission's indecency determination. Each of the Commissioners has independently considered this material in light of his or her knowledge of the views of the average viewer or listener and general expertise in broadcast matters. *See Infinity Broadcasting Corporation of Pennsylvania (Reconsideration)*, 3 FCC Rcd 930, 933 (1987).

this type of language and programming is unavailing, and such an argument in the future is not a shield against Commission sanctions.

We flatly disagree with your conclusion that this Commission must consider evidence of the popularity of explicitly sexual programming as broadcast throughout the country in order to determine where to draw the line separating indecent programming from non-indecent programming. To the extent this argument suggests that conduct that is widespread cannot be unlawful, it is plainly wrong. To the extent it implies that the popularity of a particular program or type of programming among adults undermines the classification of that material as indecent, it ignores the fact that our concern in enforcing indecency restrictions is with protecting children. *See Enforcement of Prohibitions Against Broadcast Indecency, Report and Order* in GC Docket No. 92-223, FCC 93-42 (released January 22, 1993), *petitions for review pending sub nom., Action for Children's Television, et al., v. FCC,* Nos. 93-1092, 93-1100 (D.C. Cir. filed January 27, 1993).

We turn now to your arguments that the programs in question are not aimed at children, do not appeal to children, do not reach children, and do not harm children. These are essentially the same arguments that we have rejected on numerous prior occasions. *See, e.g., Sagittarius Broadcasting Corporation,* 5 FCC Rcd 7291, 7292 (MMB 1990); *Evergreen Media Corporation of Chicago AM,* 6 FCC Rcd 3708 (MMB 1989); *see also Report and Order, supra,* at ¶ ¶ 17-18, 20-27, 38. In our judgment,[2] in the judgment of the Supreme Court,[3] and in the judgment of the United States Congress,[4] whether there is a reasonable risk that children will be exposed to indecent broadcast material may be properly considered a function of the time of day during which the material is aired. Moreover, indecent material, regardless of its intended audience or arguably limited appeal to children, may be presumed to be harmful to the children who are exposed to it. *FCC v. Pacifica Foundation,* 438 U.S. 726, 757-58 (1978) (Powell, J., concurring); *accord Sable Communications of Cal., Inc. v. FCC,* 492 U.S. 115, 126-27 (1989).

In conclusion, it appears that the subject broadcasts describe sexual activities and organs in patently offensive terms and are therefore indecent. Because they aired at times of day when there was a reasonable risk that children may have been in the audience, they are legally actionable. Thus, it appears that on January 13 and on March 4, 1991, Station WLUP(AM) violated 18 U.S.C. § 1464 by airing indecent programming. Accordingly, pursuant to Section 503(b) of the Communications Act, Evergreen Media Corporation of Chicago AM is hereby advised of its apparent liability for a forfeiture of thirty three thousand seven hundred fifty dollars ($33,750) for its apparent willful and repeated violations of 18 U.S.C. § 1464. The amount specified was determined by using the criteria set forth in the *Policy Statement, Standards for Assessing Forfeitures,* 6 FCC Rcd 4695 (1991), *on recon.,* 7 FCC Rcd 5339 (1992), *pet. for review pending sub nom., USTA v. FCC,* No. 92-1321 (D.C. Cir. filed July 30, 1992), and the factors set forth in Section 503(b)(2) of the Communications Act of 1934, as amended. The base amount for an indecency violation is $12,500. Because the violation was repeated, and because your past compliance history includes similar apparent misconduct,[5] we are increasing the forfeiture amount accordingly. *See Policy Statement, supra,* at 4700.

In regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 U.S.C. § 1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

This letter was adopted by the Commission on February 17, 1993.

Commissioner Marshall not participating.

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

ATTACHMENT

Radio Station WLUP(AM), Chicago, IL
Steve and Garry Show, January 13, 1991, at 5:30 p.m.

MV: Male Voice
MV2: Second Male Voice
FC: Female Caller
MC: Male Caller

MV: Chet will be at the stadium at 7:00 . 7:30 is game time.
MV2: And let's take some calls.
MV: 591-9587
FC: (Unintelligible)
MV: You're on the air. What. Hello.
FC: Hi, oh, hi there. Mmm.
MV: Hi.

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[2] *See Enforcement of Prohibitions Against Broadcast Indecency,* 5 FCC Rcd 5297, 5309 (1990) (describing children's "grazing" behavior to support a marketwide view of "reasonable risk").

[3] *FCC v. Pacifica Foundation,* 438 U.S. 726 (1978).

[4] Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16(a), 106 Stat. 954 (1992) (adopting "safe harbor" for indecent broadcasts).

[5] *See Evergreen Media Corp.,* 6 FCC Rcd 502, *recon. denied,* 6 FCC Rcd 5950 (MMB 1991), finding that three portions of the "Steve and Garry Show" as broadcast on WLUP(AM) on August 19, 1987, and March 30, 1989, were indecent. Consistent with the provisions of Section 504(c) of the Communications Act, we do not take into account in today's action the fact that this forfeiture order remains outstanding; we simply cite it to exemplify the pattern of apparent misconduct warranting the fine we set today. *See Sagittarius Broadcasting Corp.,* FCC 92-554 at note 3 (Notice of Apparent Liability issued December 18, 1992).

FC: I just want to, is this Steve and Garry?

MV: Yes. (Unintelligible) How can we help you.

FC: Oh, hi. I just wanted to let Steve know that I had talked to, I had read about.

MV: Yes.

FC: Well, Steve, I was listening to the "best of" and you were saying you had a meager helping of manhood. Right? Is that true?

MV: Ah, I don't.

MV2: What's your point ma'am? Narrow your focus. Remember.

MV: Remember more than a mouthful is a waste.

FC: OK. OK. Here it goes, well, I just wanted you to know I was reading a scientific report on sex and it says that there is no indication.

MV: Right, it's that thing right at the front.

FC: Right.

MV: That thing that you're shooting for is right at the front there. Yeah, I know all that you know. I, self deprecation is one of my strong points.

MV2: Yeah, well you should go to the bathroom because if you do that in your pants (laughter).

MV: I know that it, I know that.

FC: But it's no indication of the size it will be.

MV: Huh?

MV2: I don't think you two are on the same page.

FC: I'm saying that the flaccid manhood is no indication of.

MV: Oh, right, right. Oh, right.

FC: Oh, OK.

MV: Yeah.

FC: I didn't know that you knew that.

MV: Oh, yeah. I know it's pretty amazing, actually (laughs) one of those magic rocks or something (unintelligible) it's like a sea monkey that thing.

FC: Does that mean that somebody's going.

MV: It's more, huh?

FC: Somebody who looks like they might be really big, it might not work.

MV: Well, it might not get that much bigger.

FC: Right.

MV: Exactly,

MV2: Actually.

MV: With me it's an element of suprise, you don't know.

MV2: And this does tie.

MV: When will it stop?

MV2: This does tie into the Middle East because that's what is going on over there (unintelligible) flaccid manhood.

MV: I'm fairly secure with mine.

MV2: Fairly.

FC: Well, I'm glad.

MV: Well, you know actually it's a function of being fat, too. That it sort of doesn't hang like it might on a more slender gentleman but I have to say that it has not failed me yet. So, well, maybe once or twice but,

FC: Well, I guess that happens to everyone. I've read.

MV: But that's after several double operations (unintelligible).

MV2: I'm sorry, Jack Daniels.

MV: Ever since I saw that Chad Everett show, I haven't had that trouble but thanks. But then, I don't really use that topic too much any more.

FC: Oh.

MV: That must have been an older show.

MV2: We're trying to undermine Steve and in his final hours. Rick is leaving us after tomorrow.

MV: Right, but, yeah. No, it's a, when I was a kid in school you know, geez, I don't know.

MV2: Steve, please, there's no explanation needed (unintelligible).

MV: You know well before gym class I was trying to semi-arouse myself so as to fit in with the other boys more, only because.

MV2: I'm sure that wasn't mistaken or anything else.

MV: Because in its relaxed state it tends to be very relaxed and almost like a little rose. (Unintelligible)

MV2: We've all been to Wisconsin. We know it's very relaxing (laughs). Enough, thank you. She's working for your ex-wife.

MV: (Unintelligible) During vasectomy you saw when he becomes aroused

MV2: Yeah, we all stood back (Unintelligible) we didn't have to but we did.

MV: Jack and the Beanstalk.

MV2: Who are you working for ma'am? His ex-wife? What

MV: Really, geez.

FC: OK. Well, that's.

MV: It's a bit, you know, it's relateable(?) Guys go, yeah, and then women go, Oh, I love a sensitive man who, it's a thing you know, I won't be making any porno movies, but I'm OK.

FC: Yeah, women do love that modesty that you have.

MV: Mmm. Mmm. Yeah, if they don't like to talk it they, it's like guys I guess. Guys say certain, like breast size doesn't really matter so when they get together they make jokes about it and women do the same thing with penis sizes. It seems like they know intellectually and all that and if they love someone it really doesn't matter but when they get together and want to talk dirty it sort of becomes a topic.

FC: (Laughs).

MV: So yes, it could, you know, it does make certain people feel, you know, insecure, but like I said, more than a mouthful is a waste, right?

FC: I hope so.

MV: Yeah, OK?

FC: OK.

MV2: Thanks Janet. See you later.

MV: Jesus, can we monitor what kind of tapes he's playing in here.

MV2: He doesn't care. He's a lame duck, although he'll still do the "best of" right?

MV: Yeah, apparently but we're going to have to control what he plays cause he's just going to play things that humiliate me cause I make fun of him and his girl friend and his little wedding, so sure OK, let's see if he goes to the computers. Small penis, what have, we got?

MV2: Oh, my God. Eighty-five through eighty-nine, that's all there was.

MV: I'm sure. I'm like most guys. I wouldn't mind if it was a little bigger but it does the job. You know, what are you going to do? Guys tend to judge each other that way and so it wouldn't hurt to be packing a little bit more but what are you going to do. You know it's not like you earn it or anything. It's just there whatever it is, is what it is and it gets the job done.

MV2: Right. You can write your name in the snow just like everybody else.

MV: That's right and the wife doesn't complain that much about it. So ever since I got out of the elect, the electrical appliance so.

MV2: So let's move on to line two.

MV: We got to monitor him. It's a phase I went through four or five years ago. I worked through it. The doctor told me it was normal size. It's just that I'm big so it tends to pull muscles, pull it up and you know when I'm not aroused, that was before the vasectomy. After that I felt fine about it, right? I mean there were a million people watching the vasectomy.

MV2: Taking pictures

MV: I'm very comfortable with that now, right?

MV2: Yeah.

MV: And then he plays a tape that gets everybody all stirred up. What is that? What? Does anybody monitor him on the weekends? He can play anything he wants?

MV2: No.

MV: He'll play this now.

MV2: Steve, who said they had come to terms with.

MV: Well, here's the funny thing. This weekend we were staying downtown at a hotel and we went swimming and this hotel has a health club and gym. Captain boy Jim, who lives nearby came by to say hi to the kids and Pat said, as we were undressing in the health club (laughs).

MV2: Yeah, go on.

MV: He said, show Jim how your penis sticks to your balls.

MV2: OK, now it's a parlor game with the kids.

MV: I said, you know I never really wanted to show that. I don't want to show that.

MV2: Boy, I'll tell you, you know, Art Linkletter said it best. Kids say the darndest things. don't they?

MV: Now then the kids even mock me. It's, I can't walk around in the state of arousal all day just to prove to people that.

MV2: No, you can't.

MV: What am I going to do?

MV2: Don't be uncomfortable.

MV: You know, I give it a couple of shakes before I hit the locker room. I hope you know but even Pat said, he said, it was humiliating. Pat.

* * * *

MV: How come it only hangs out when I'm around women? See, I can't help it, yours hangs, yours hangs down when you're around guys. What do want me to do? Mine doesn't come out until there's a woman around, OK? Does that mean there is something wrong with me?

MV2: Rick, this is not to be used.

Radio Station WLUP(AM), Chicago, IL
Kevin Matthews Show, March 4, 1991, at 11:35 a.m.

MV: Male Voice

M2: Second Male Voice

FC: Female Caller

MC: Male Caller

MV: Pinkie(?)

M2: Oh, here I am. They spelled my name wrong. Ah.

MV: Is it a weinie? Weinie.

M2: No, it's not a weinie.

FC: (Laughs)

M2: My name is, my name is not Kevin Weinie. All right.

MV: Because you don't have.

M2: I don't have a penis.

FC: (Laughs)

M2: You know we mentioned that before. I was circumcised every year for my birthday.

FC: (Laughs)

M2: But I do get the special parking privileges.

MV: He's got a handicapped sticker.

M2: I've got no, I've got the penis with the circle around it.

MV: Right.

M2: And a line through it.

MV: Right.

FC: (Laughs)

M2: That gets you good parking.

M2: That gets you good parking. Ah.

FC: Well now, what I'm really looking forward to.

M2: Oh penis (Singing to the tune of Oh, Venus).

M2/MV: Oh penis. (Singing)

FC: (Laughs)

M2: Penis, if you will (Singing).

MV: Who gave you.

M2: Carla, we'll see you there tomorrow, tonight, not tomorrow night, tonight, tonight, tonight.

MV: Don't you be singing the penis song up on stage at the Remain(?) theatre. OK?

FC: All right.

M2: Bye.

FC: Bye, bye.

M2: You don't hear other people singing the penis song because we got Rabbi Doug.

MC: You sure do. How you doing?

M2: Hi, Rabbi Doug.

MC: How you been?

M2: Good, remember Rabbi Doug?

MC: Sure do.

MV: Your 18th birthday, that was it. No need to see Rabbi Doug anymore.

M2: I saw him every year. Hi, rabbi, what do you need?

MC: Well, I just thought I'd check you guys out about your countries.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-71

In re Applications of	
WILLIAM E. FITTS	File No. BPH-890913MJ
PATRICIA A. KORN	File No. BPH-890914MR
SOTO, INC.	File No. BPH-890914NL

For Construction Permit for
New FM Station, Channel 228C,
Laughlin, Nevada

ORDER

Adopted: February 17, 1993; Released: February 25, 1993

By the Commission:

1. Before the Commission is an Application for Review filed by Soto, Inc. (Soto) on September 3, 1992, and an Opposition filed September 18, 1992, by William E. Fitts (Fitts). These pleadings relate to a Review Board decision, *William E. Fitts*, 7 FCC Rcd 4909 (Rev. Bd. 1992), granting the application of Fitts and denying Soto's application.[1] Having thoroughly reviewed the pleadings, the record, and the Board's decision, we agree with the Board's disposition of this case and affirm its decision. Nevertheless, we wish to comment on certain matters.

2. Soto contends that the Commission's ownership attribution determination for calculating the applicant's integration credit in *Cotton Broadcasting Company*, 4 FCC Rcd 1781 (1989), was based solely on the fact that there was an existing state law permitting general partners to own equity interests in a limited partnership as limited partners, and that, since there is no such law governing corporations in Nevada, the Board's reliance on *Cotton*, as well as *Richard Sorenson*, 6 FCC Rcd 1952 (1991), which extended the *Cotton* principle of ownership attribution to two-tiered corporate applicants, provide no basis for its award of only 10% quantitative integration credit to Soto. We disagree. Although the Commission did find in *Cotton* that the underlying purposes of the law permitting one person to be both a general and limited partner (*i.e.*, to raise capital for the partnership and to allow the general partners to increase their profits via additional equity as limited partners) were fully consistent with its policy of not restricting the capacity of entrepreneurs to enter the broadcasting industry, it did not posit its ownership attribution determination in that case on that basis. Rather, as the Board aptly observed, its determination in that regard was predicated solely on its holding that, when general partners in a limited partnership applicant own equity as limited partners, it is impossible to provide the insulation required to demonstrate the separation of active and passive ownership interests consistent with the Commission's ownership attribution requirements.[2] In light of the fact that each of Soto's owners has both a voting and nonvoting interest, the Board correctly applied *Cotton* in this case. *See* 7 FCC Rcd at 4910 ¶ ¶ 7-8, and *Las Americas Communications, Inc.*, 6 FCC Rcd 1507, 1513 n.27 (1991).

3. Soto also contends that the designation of its stock as voting and nonvoting, in and of itself, provides the insulation required by the Commission's ownership attribution requirements, and that the Board erred in failing to recognize this. We likewise find no merit to that argument, as we have already considered and rejected a similar contention on reconsideration in *Sorenson, supra*.[3] Soto has not submitted any information which would persuade us to hold otherwise here, and as we stated in *Royce International Broadcasting*, 5 FCC Rcd 7063, 7065 n.12 (1990), the burden of demonstrating the reliability of an integration proposal, including the adequacy of insulation provisions, remains squarely on the applicant.

4. Finally, we reject Soto's contention that the Commission's language in *Sorenson*, 6 FCC at 6903 n.3, somehow required the Board to decide this case on the basis of the facts concerning control of the applicant's affairs. We agree with the Board that there is no need to consider questions of control in this case. The Commission in *Sorenson* merely explained that, if the record had shown that the applicant's minority nonvoting stockholder (6% owner) had been improperly involved in the prosecution of the application to the extent delineated in paragraph 6 of *Royce International, supra*, the applicant would still be entitled to 96% quantitative integration credit, and that such an award would not in any event affect the outcome of the case. Here, without regard to any questions of control, the record shows that Soto's 90% equity owner will have the ability to be actively involved in the applicant's affairs by virtue of ownership of both voting and nonvoting stock interests, and thus Soto is only entitled to credit for 10% integration of ownership and management. 7 FCC Rcd at 4910 ¶ 8.

5. ACCORDINGLY, IT IS ORDERED That, pursuant to 47 C.F.R. § 1.115(g), the application for review filed September 3, 1992, by Soto, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[1] Patricia A. Korn's application (File No. BPH-890914MR) was also denied. As she has not sought review, the Board's denial of her application has become final.

[2] *Attribution of Ownership Interests*, 97 FCC 2d 997 (1984), *recon granted in part*, 58 RR 2d 604 (1985), *further recon. granted in part*, 1 FCC Rcd 802 (1986).

[3] *See* 6 FCC Rcd at 6901 ¶ ¶ 4-5.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-227

In the Matter and Applications of

NEWSOUTH BROADCASTING, INC.
WFXL(TV), Albany, Georgia
File Nos. BTCCT-900305LD
BTCCT-910308KE

Order to Show Cause Why the License of WFXL(TV) Should Not Be Revoked; Application for Transfer of Control to NewSouth Broadcasting, Inc., Debtor-in-Possession

TIMOTHY S. BRUMLIK
Permittee of Low Power Television Station W07BZ, Orlando, Florida
File Nos. BLTVL-891107JE
BAPTVL-900105IA
BAPTVL-910607IB

Order to Show Cause Why the Permit of W07BZ Should Not Be Revoked: Application for License to Cover Construction Permit; Application for Assignment of Construction Permit to Robert Sandusky; and Application for Assignment of Construction Permit to Timothy S. Brumlik, Debtor-in-Possession

NEWSOUTH MEDIA CORPORATION
Permittee of Low Power Television Station W12CD, Altamonte Springs, Florida
File Nos. BMPTVL-900129IA
BAPTVL-900105IC

Order to Show Cause Why the Permit of W12CD Should Not Be Revoked; Application for Modification of Construction Permit; and Application for Assignment of Construction Permit to Televista, Inc.

NEWSOUTH BROADCASTING, INC.
Permittee of Low Power Television Station W13B0, Valdosta, Georgia
File Nos. BMPTVL-900125IA
BMPTVL-891208R4
BLTVL-900125IB
BAPTVL-900703IE

Order to Show Cause Why the Permit of W13B0 Should Not Be Revoked; Application to Replace Expired Construction Permit; Application for Modification of Construction Permit; and Application for Assignment of Construction Permit to General Management Consultants, Inc.

TIMOTHY S. BRUMLIK
Permittee of Low Power Television Station W12CC, Cocoa, Florida
File Nos. BAPTVL-900105IB
BMPTVL-910301JG
BAPTVL-910607IC

Order to Show Cause Why the Permit of W12CC Should Not Be Revoked; Application for Assignment of Construction Permit to Robert Sandusky; Application for Extension of Construction Permit and Application for Assignment of Construction Permit to Timothy S. Brumlik Debtor-in-Possession

NEWSOUTH BROADCASTING, INC.
Lumber City, Georgia
File No. BPTVL-870702TX

For a Construction Permit for a New Low Power Television Station

ORDER

Adopted: February 10, 1993; Released: February 25, 1993

By the Commission: Commissioner Marshall not participating.

1. Before the Commission are a Petition for Extraordinary Relief and a Request for Contingent Dismissal of Applications, both filed January 15, 1992, by Timothy S. Brumlik, NewSouth Broadcasting, Inc. (NBI)

and NewSouth Media Corporation (NMC),[1] and related pleadings.[2] Brumlik and NBI filed petitions for bankruptcy protection in the United States Bankruptcy Court. Brumlik and the NewSouth Companies request Commission approval of applications for the assignment of the license for Station WFXL(TV) and the permits for the four Low Power Television Stations to Michael A. Cantu, the general manager and 3 percent owner of NBI, under the auspices of the Bankruptcy Court so that the proceeds can be used for the benefit of innocent creditors.

2. Brumlik was convicted of violating Title 18 U.S.C. § 1956(a)(3)(B) (laundering money), and issues were designated to determine if he is qualified to be or remain a Commission licensee. The Commission's general policy is that, when character qualifications issues have been designated against a licensee in a renewal or revocation hearing, the licensee cannot assign the license until it is found qualified to be a Commission licensee or one of the exceptions to that policy is found to be applicable. In *Second Thursday Corp.*, 22 FCC 2d 515, 516, *recon. granted*, 25 FCC 2d 112 (1970), the Commission established an exception to that policy asserting that it would approve the assignment of a license if "the individuals charged with misconduct will have no part in the proposed operations and will either derive no benefit from favorable action on the application or only a minor benefit which is outweighed by equitable considerations in favor of innocent creditors." As noted by the Bureau, the *Second Thursday* policy is applicable by its terms only where a licensee is in bankruptcy. Mass Media Bureau Comments filed January 3, 1992 at p. 4.

3. Here, there are two potential impediments to application of the *Second Thursday* policy. First, petitioners acknowledge that NMC is not a party to the bankruptcy proceeding, which raises concerns about the circumstances surrounding the sale of NMC's LPTV permit. Second, Cantu is a business associate of Brumlik, which raises concerns that Cantu may continue his existing relationship with Brumlik and that Brumlik may be involved in the future operation of these facilities. In light of these concerns, the General Counsel asked the petitioners to comment on how approval of the assignment of NMC's permit for Low Power Television Station W12CD Altamonte Springs, FL. would comport with the *Second Thursday* policy, and to submit assurances from Cantu, prepared in accordance with 47 C.F.R. § 1.16, "that Brumlik will not be involved in the operation of the stations in the future." *NewSouth Broadcasting, Inc.*, 92I-068, released August 28, 1992, and FCC 92I-079, released September 28, 1992.[3]

4. In their comments, Brumlik and the NewSouth Companies provided assurance from the trustee in bankruptcy that the proceeds from the transfer of all of the authorizations will be paid into the bankruptcy court and that only the nominal amount of $1 will be apportioned to the transfer of NMC's permit for LPTV Station W12CD Altamonte Springs, FL. As noted by the Bureau, Brumlik will not benefit from the transfer of the permit for W12CD. Bureau's Comments filed September 8, 1992 at p.2. Thus, even though NMC is not in bankruptcy the transfer of its permit for W12CD is in keeping with the spirit of the *Second Thursday* policy, and is not a bar to a grant of the Petition for Extraordinary Relief.[4] Moreover, Cantu, who was not involved in Brumlik's misconduct, has given assurance that "Timothy S. Brumlik will have absolutely no involvement in the operation of such stations, either as an employee or in any other capacity, . . . [when Cantu acquires the stations] or at any time in the future." Comments, filed October 8, 1992 by Brumlik and the NewSouth Companies. That assurance is unchallenged.

5. In light of these comments, we are persuaded that the petitioners qualify for relief under *Second Thursday*. In particular, the record establishes that Brumlik's interest in the stations will be terminated, Brumlik will, based on Cantu's sworn statement, have no role in the future operation of the stations, the proceeds from the sales will be paid into the Bankruptcy Court and be distributed by the trustee for the benefit of innocent creditors, and Brumlik will, at most, receive only an incidental benefit from the elimination of his potential liability through the bankruptcy. Under these circumstances we will grant the Petition for Extraordinary Relief and the Request for Contingent Dismissal of Applications.

6. Finally, consistent with our delegation of authority to the Mass Media Bureau to process proposed distress sales, we will similarly delegate authority to the Bureau to process requests for relief pursuant to the *Second Thursday* policy. *See Minority Ownership In Broadcasting*, 92 FCC 2d 849, 858-59 (1982). The evolving nature of the *Second Thursday* policy has established a sufficient body of precedent to enable the staff to facilitate the processing of petitions and the resolution of hearing proceedings, while protecting the interests of innocent creditors. Therefore, authority is hereby delegated to the Bureau to process those petitions that are *consistent* with established Commission policy and *do not* involve novel questions of fact, law or policy concerning the *Second Thursday* policy.

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[1] By an Order to Show Cause and Hearing Designation Order, 6 FCC Rcd 5047 (1991), this proceeding was instituted concerning WXFL(TV), four low power television permits, and an application for a new low power television station. Brumlik and the NewSouth Companies request termination of this proceeding and dismissal of all but one of the above-captioned applications, contingent on the grant of both assignment applications pending before the Mass Media Bureau for the low power authorizations which were filed concurrently with the Petition for Extraordinary Relief, and the assignment application for WFXL(TV) (BTCCT-900305LD) as amended by a Petition for Leave to Amend filed May 1, 1992.

[2] Those pleadings include: a Supplement to Petition for Extraordinary Relief, filed January 16, 1992 by Brumlik and the NewSouth Companies; Comments filed February 3, 1992 by the Mass Media Bureau; Supplements filed May 1 and 7, June 22, July 17 and August 4 and 11, 1992 by Brumlik and the New South Companies; Comments filed May 18, July 20 and August 12, 1992 by the Bureau; and Comments filed June 1 and 22, 1992, and Supplemented on June 30, 1992 by James C. Orr, Bankruptcy Trustee.

[3] Comments were filed September 8 and October 8, 1992 by Brumlik and the NewSouth Companies and September 8 and October 15, 1992 by the Mass Media Bureau. In its responses, the Bureau supports the request for *Second Thursday* relief.

[4] As reflected in *La Rose v. FCC*, 494 F.2d 1145, 1146-47 n.2 (D.C. Cir. 1974), the *Second Thursday* policy is intended to accommodate the policies of the federal bankruptcy law with those of the Communications Act, and, thus, *Second Thursday* questions should be considered in light of the public interest in the protection of innocent creditors.

7. ACCORDINGLY IT IS ORDERED, That the Petition for Extraordinary Relief filed January 15, 1992, by Timothy S. Brumlik, NewSouth Broadcasting, Inc. and NewSouth Media Corporation IS GRANTED.

8. IT IS FURTHER ORDERED, That the Request for Contingent Dismissal of Applications filed January 15, 1992, by Timothy S. Brumlik, NewSouth Broadcasting, Inc. and NewSouth Media Corporation IS GRANTED; that the Application for Transfer of control of Station WFXL(TV) filed by NewSouth Broadcasting, Inc. (BTCCT-910308KE), the Application concerning Low Power Station W07BZ filed by Timothy S. Brumlik (BAPTVL-900105IA and BAPTVL-910607IB), the Application concerning Low Power Station W12CD filed by NewSouth Media Corporation (BAPTVL-900105IC), the Applications concerning Low Power Station W13BO filed by NewSouth Broadcasting, Inc. (BAPTVL-900703IE), the Applications concerning Low Power Station W12CC filed by Timothy S. Brumlik (BAPTVL-900105IB and BAPTVL-910607IC) and the Application for a New Low Power Station at Lumber City, Georgia filed by NewSouth Broadcasting, Inc. (BPTVL-870702TX) ARE DISMISSED; and that this proceeding IS TERMINATED provided that if after further action by the Mass Media Bureau pursuant to its delegation of authority, the remaining applications filed by Timothy S. Brumlik, NewSouth Broadcasting, Inc. and NewSouth Media Corporation for assignment of licenses and permits for the captioned stations to The Bonita Corporation and Michael Cantu, together with any other ancillary applications, are denied or not consummated, the action taken herein shall be void and the proceeding will be returned to the status quo ante.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-24

In re

Amendment of Part 74 of the
Commission's Rules With Regard
to the Instructional Television
Fixed Service

NOTICE OF PROPOSED RULEMAKING

Adopted: February 11, 1993; Released: February 25, 1993

Comments Due: April 19, 1993
Reply Comments Due: May 19, 1993

By the Commission: Commissioner Marshall not participating.

1. The Commission, on its own motion, proposes to modify one of the procedural rules governing the Instructional Television Fixed Service (ITFS). We propose to amend the method by which ITFS applications are filed and processed. Currently, applicants for new ITFS stations or major changes in existing stations are subject to the traditional A/B cut-off approach described below in paragraph 3. We seek comments addressing a possible change to an approach using filing windows, which would allow us to control better the flow of applications and process them more efficiently. In addition, during the pendency of this proposed rulemaking, we shall not accept applications for new ITFS facilities or major changes in existing ITFS stations, with the following exceptions: we shall accept for filing applications in which the applicant relies on the National Telecommunications and Information Administration for construction funds, as well as applications that are submitted in response to outstanding "A" cut-off lists.

BACKGROUND

2. In 1983, the Commission authorized ITFS licensees to lease their excess channel capacity to wireless cable operators.[1] *Report and Order* in Gen. Docket No. 80-112 (*Instructional TV Fixed Service*), 94 FCC 2d 1203 (1983). The Commission was concerned that ITFS channels were not being heavily utilized except in a few major metropolitan areas, although the service had existed for two decades.[2] *Instructional TV Fixed Service* at 1214. The Commission found that the cost of constructing and operating an ITFS system represented a significant burden to potential and existing licensees, and that additional revenue sources were necessary in order to give the service a chance to flourish. *Id.* at 1250. The Commission also determined that the income derived from the leasing of excess channel capacity could enable ITFS operators to broadcast during a greater portion of the day, could increase programming availability, and could result in the activation of currently vacant channels. *Id.*

3. At the time the Commission acted, ITFS was an underutilized service. *Id.* at 1211-14. No cut-off periods or other procedural restrictions then existed for the filing of petitions to deny or of mutually exclusive applications. However, the authorization of excess capacity leasing led to an increase in the number of applications filed, and the rules did not allow for an orderly, efficient, and equitable processing of those applications. *Further Notice of Proposed Rulemaking* in MM Docket No. 83-523 (*Instructional Television Fixed Service*), 98 FCC 2d 1249, 1259-60 (1984). Accordingly, the Commission inaugurated a cut-off procedure. Analyzing the options before it, the Commission rejected a proposed window approach and determined that the traditional A/B cut-off procedure would best serve the public interest. *Second Report and Order* in MM Docket No. 83-523 (*Instructional Television Fixed Service*), 101 FCC 2d 49 (1985). This procedure involves placing the first application(s) accepted for filing and determined to be substantially complete on a public notice called an "A cut-off list." This list notifies the public that the application has been accepted and gives interested parties 60 days to file competing applications or petitions to deny. An applicant placed on the "A" cut-off list is required to make any major changes to its proposal before the end of the cut-off period. After the "A" period expires, the staff places all substantially complete applications which were filed during that period and found to be mutually exclusive with any listed "A" application on a "B" list. This list notifies the public that the specified applications have been accepted for filing, and it provides 30 days for the filing of petitions to deny or minor amendments. When it inaugurated the A/B cut-off procedure for ITFS applications, the Commission believed that use of a filing window would have been inappropriate, because educational institutions generally lack expertise in filing for Commission licenses and frequently require time to obtain government funding and to negotiate an excess capacity lease. *Id.* at 73.

4. Since the Commission first considered these issues several years ago, however, the telecommunications environment has changed substantially, and we have significantly amended our regulations to avoid inhibiting the growth of ITFS and wireless cable services in that new environment. In the last three years we have modified the minimum programming requirements for new ITFS operators;[3] authorized 15-mile interference protection for ITFS licensees which lease excess capacity for wireless cable operations;[4] authorized the use in some situations of channel mapping technology by ITFS licensees and wireless

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[1] We do not intend to suggest by our use of the term "wireless cable" that it constitutes "cable" service for statutory or regulatory purposes.

[2] The Commission inaugurated ITFS in 1963. *Report and Order* in Docket No. 14744 (*Educational Television*), 39 FCC 846 (1963), *recon. denied*, 39 FCC 873 (1964).

[3] *Report and Order* in Gen. Docket Nos. 90-54 and 80-113 (*Wireless Cable Order*) 5 FCC Rcd 6410, 6416 (1990).

[4] *Order on Reconsideration* in Gen. Docket Nos. 90-54 and 80-113 (*Wireless Cable Reconsideration*) 6 FCC Rcd 6764, 6766-67 (1991).

cable lessees;[5] and modified our "ready recapture" requirement with regard to excess channel capacity leasing by eliminating unduly restrictive time-of-day and day-of-week regulations.[6] Educational institutions and wireless cable entities have responded enthusiastically to these changes, creating the environment necessary for building and maintaining robust ITFS and wireless cable services.

5. With these changes, there has been a tremendous increase in the number of applications proposing the construction of new ITFS stations or major changes in the authorized facilities of such stations. In fiscal year 1991 alone, 454 new or major change ITFS applications were filed, a total that nearly equalled the aggregate number of such applications that had been filed in the four previous fiscal years. In fiscal year 1992, which ended September 30, 1992, the rate of application receipts increased steadily. As a result, we received in that time 878 applications, nearly twice the number of new or major change ITFS applications than had been filed in FY 1991. In addition, the nature of these recently filed ITFS applications changed dramatically. As the interest in the ITFS service grew, more and more of the applications filed were found to be mutually exclusive with ITFS applications listed on "A" cut-off notices.[7] The cut-off procedure has become inefficient, requiring an initial processing of a substantial number of applications simply to place them on an "A" cut-off list, with little benefit. Because each application must be processed a second time for legal and technical analysis, we are confronted with time-consuming double processing, which is an inefficient use of Commission resources. Further, more than 90% of these recently filed applications contained excess capacity lease agreements with wireless cable operators that were to provide substantial funding for the construction and operation of the ITFS facilities. This dramatic increase in the number and mutually exclusive nature of ITFS applications has significantly burdened our capacity to expeditiously and effectively authorize service, thereby prompting the filing window proposal we outline below.

FILING WINDOW PROPOSAL

6. Specifically, we seek comment on modifying the rules, so as to replace the above system with one utilizing filing windows, such as currently used by the low power television service.[8] This approach would specify a limited period of time for filing applications for new facilities, applications for major changes in existing facilities, or major amendments to pending applications.[9] The Commission would give Public Notice no fewer than 60 days or some longer period before opening a filing window, so as to provide adequate time for potential applicants to prepare. The window would remain open for a specified number of days, and no application would be accepted before or after the stated window of opportunity for filing. Applications not mutually exclusive with any other application and found to be acceptable would be placed on a proposed grant list; mutually exclusive applications would be placed on Public Notice. In each case, we would provide a 30-day period for the submission of petitions to deny. Single uncontested applications could then be granted, and winners could be selected from among the mutually exclusive applications pursuant to the selection process currently in use. Under our proposal, applications which have already been tendered but not yet placed on an "A" cut-off list as of the adoption date of this *Notice* would not be placed on a cut-off list. Rather, they will be considered cut off as of the close of the first filing window. Applications already cut off or filed in response to an outstanding "A" cut-off list[10] will be processed under existing standards.

7. We believe that use of a filing window will allow the staff to control the flow of applications better, thereby significantly improving processing efficiency. In addition, many of the factors that made the Commission wary of a window procedure at the time it adopted the A/B cut-off approach[11] are now considerably less relevant, due to the substantial changes in the ITFS and wireless cable services that have occurred since 1985. The dramatic increase in excess channel capacity lease agreements between ITFS and wireless cable operators greatly diminishes our initial concern that educational institutions would require a substantial amount of time to obtain funding before applying for an ITFS license. Our analysis of the lease agreements reveals that the wireless cable entities almost always pay for the construction of the ITFS facilities. In addition, as wireless cable entities have gained experience with excess capacity leases, their agreements have become more uniform; therefore, less time is needed to negotiate them. Finally, unlike educational organizations, the wireless cable operators have expertise in filing for Commission licenses, and they frequently have in-house legal and engineering staff who can expeditiously prepare ITFS applications. As a result of all of these changes, it appears that the Public Notice announcing the opening of a filing window would provide educational institutions with sufficient time to prepare their applications. It also appears that potential ITFS licensees and wireless cable operators could form an excess capacity agreement and prepare an application in advance of a window Public Notice, in preparation for the next window.

8. We seek comment, therefore, on whether circumstances have sufficiently changed since 1985 to warrant a departure from the current method of filing applications. Commenters are also invited to address how far in advance

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[5] *Id.* at 6774.

[6] *Id.*

[7] To resolve cases involving mutually exclusive applications, a comparative selection process is used, by which points are awarded based on specified criteria deemed to be most relevant to predicting the applicant best qualified to provide the service for which the ITFS spectrum was established. *Second Report and Order*, 101 FCC 2d 49 (1985). Applicants remaining tied after the points are awarded engage in a tie-breaker involving the number of students they have enrolled. *Third Report and Order* in MM Docket No. 83-523 (*Instructional Television Fixed Service*), 4 FCC Rcd 4830 (1989).

[8] *See Report and Order* in MM Docket No. 83-1350 (*Low Power Television*) 102 FCC 2d 295 (1984).

[9] Under our proposal, we will accept the filing of applications for minor changes, as defined by Section 74.911(a) of the Commission's Rules, at any time. If such a change is mutually exclusive with a tendered (but not yet cut off) application pending as of the adoption date of this *Notice*, it will be considered in conjunction with that application.

[10] The currently outstanding "A" cut-off lists were released on December 17, 1992, and February 10, 1993.

[11] *See Second Report and Order* at 73-74.

a window should be announced. We additionally seek comment on how much time is sufficient to keep the window open. Should we open the window in parallel with National Telecommunications and Information Administration (NTIA) funding grant periods? We emphasize that our proposed rulemaking involves only the narrow area of the filing window for applications for new ITFS facilities, applications for major changes to existing stations, and major amendments to pending applications; interested parties should accordingly restrict their comments to that particular issue.

9. We believe that potential ITFS applicants, in order to apply for a license or a major change before the possible adoption of a filing window rule, may inundate the Commission with applications while the "A" and "B" cut-off rule is still in effect. This would defeat the purpose of the proposed rulemaking and would force us to divert scarce Commission resources to the task of processing an even larger quantity of applications than already exists. Accordingly, for a short period of time, we will not accept applications for new ITFS facilities or for major changes to existing facilities.[12] However, we will continue to process applications that are already on file and already cut off. We will also continue to accept (but not process) applications in which the applicant relies on NTIA for construction funds. Otherwise, potential ITFS applicants would be unable to apply for NTIA funding, because NTIA rules require such applicants to file their applications with the Commission before seeking funding. We will consider these applications cut off as of the close of the first filing window. In addition, we will continue to accept and process applications filed in response to the two outstanding "A" cut-off lists.[13] We intend to resume accepting applications expeditiously for new ITFS facilities and for major changes in existing ITFS stations upon final disposition of the matters raised in this proceeding. We believe that this procedure will allow us to resolve some of the problems confronting the evolving ITFS and wireless cable services with no appreciable delay in processing applications. The short delay engendered by our actions in this *Notice* will shortly result in more efficient and rapid authorization of service to the public.[14]

APPENDIX

A. Ex Parte Considerations

10. This is a nonrestricted notice and comment rulemaking proceeding. *Ex Parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission Rules. *See generally,* 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

B. Comment Information

11. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before **April 19, 1993** and reply comments on or before **May 19, 1993.** To file formally in this proceeding, you must file an original and five copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to the Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, room 239, at the Federal Communications Commission, 1919 M Street, N.W., Washington, DC 20554.

C. Initial Regulatory Flexibility Analysis

12. *Reason for the Action:* This proceeding was initiated to review and update the procedures which govern the filing of applications for new ITFS channels.

13. *Objective of this Action:* The action proposed in this *Notice* is intended to improve ITFS and wireless cable service by making the regulations that govern applying for a new ITFS channel consistent with the continuing evolution of the telecommunications industry.

14. *Legal Basis:* Authority for the action proposed in this *Notice* may be found in Sections 1, 3, 4(i) and (j), 303, 308, 309, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and (j), 303, 308, 309, and 403.

15. *Number and Type of Small Entities Affected by the Proposed Rule:* Approximately 1,200 existing and potential wireless cable and ITFS operators would be affected by the proposal contained in this *Notice.*

16. *Reporting, Recordkeeping, and Other Compliance Requirements Inherent in the Proposed Rule:* The proposal suggested in this *Notice* would authorize ITFS applicants to file for a license only during specific windows. The Com-

[12] Our decision not to accept the enumerated types of applications for a short period of time is procedural in nature and therefore is not subject to the notice and comment and effective date requirements of the Administrative Procedure Act (APA). *See Kessler v. F.C.C.,* 326 F.2d 673 (D.C. Cir. 1963). In any event, pursuant to 5 U.S.C. Section 553(d)(3), we find that a delay in the effectiveness of this action could substantially undercut the goals we intend to achieve, contrary to the public interest. Accordingly, we find good cause to make our decision not to accept the applications effective on the date of adoption.

[13] *See* n.10, above. We will also continue to accept major change proposals where they are filed in the same market to accommodate settlement agreements among applicants that have previously achieved cut-off status and where the settlement resolves mutually exclusive applications.

[14] The Commission recently authorized wireless cable entities to apply in specified limited circumstances for licenses to operate on ITFS frequencies. *See Second Report and Order* in Gen. Docket No. 90-54, 6 FCC Rcd 6792, 6801-06 (1991). Both our decision not to accept the enumerated types of applications and the window filing procedure discussed in this *Notice* apply to such wireless cable applicants. In that regard, we also note that the filing procedure affecting ITFS channels discussed in this *Notice* is independent of that currently in place on the filing of applications for Multipoint Distribution Service channels. *See Notice of Proposed Rulemaking* in PR Docket No. 92-80, 7 FCC Rcd 3266, 3270 (1992).

mission has found such a procedure to be an efficient means of controlling the flow of applications in rapidly expanding services.

17. *Federal Rules which Overlap, Duplicate, or Conflict with the Proposed Rule:* None.

18. *Any Significant Alternative Minimizing Impact on Small Entities and Consistent with the Stated Objective of the Action:* The proposal contained in this *Notice* is meant to make the regulations that govern applying for a new ITFS channel consistent with the continuing evolution of the telecommunications industry.

19. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposal suggested in this document. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Notice, but they must have a separate and distinct heading designating them as responses to the Regulatory Flexibility Analysis. The Secretary shall send a copy of the Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.*, (1981)).

D. Paperwork Reduction Act Statement

20. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980, and found to impose no new or modified information collection requirement on the public.

E. Ordering Clause

21. Accordingly, IT IS ORDERED that pursuant to Sections 1, 3, 4(i) and (j), 303, 308, 309, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and (j), 303, 308, 309, and 403, this *Notice of Proposed Rulemaking* IS ADOPTED.

22. IT IS FURTHER ORDERED, upon adoption of this *Notice of Proposed Rulemaking*, that no applications for new ITFS facilities or for major changes to existing ITFS facilities will be accepted for filing by the Federal Communications Commission until further notice by the Commission. However, such applications in which the applicant relies on the National Telecommunications and Information Administration for construction funds will be accepted, but not processed. In addition, applications filed in response to the outstanding "A" cut-off lists of December 17, 1992, and February 10, 1993, will be accepted and processed.

F. Additional Information

23. For additional information on this proceeding, contact Paul R. Gordon, Mass Media Bureau, (202) 632-6357.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

Released: February 26, 1993

Dennis J. Kelly, Esq. 4410-BB
Cordon and Kelly
P.O. Box 6648
Annapolis, Maryland 21401

In re: FCVS Communications (WACH)
CSR-3464

Dear Mr. Kelly:

On July 22, 1991, you filed, on behalf of your client, FCVS Communications ["WACH"], licensee of Television Broadcast Station WACH (Ind., Channel 57), Columbia, South Carolina, an application for review of the decision of the Chief, Video Services Division, Mass Media Bureau, in *FCVS Communications (WACH)*, 6 FCC Rcd 3670 (1991). WACH's application is opposed by Columbia Television Broadcasters, Inc. ["WOLO-TV"], licensee of Station WOLO-TV (ABC, Channel 25), Columbia, South Carolina, and by Charleston TV, Inc. ["WCBD-TV"], licensee of Station WCBD-TV (ABC, Channel 2), Charleston, South Carolina. WACH has replied to the oppositions.

WACH began operation on October 2, 1981 (as Station WCCT-TV), broadcasting largely a religious programming format. WACH operated with maximum visual effective radiated power of 637 kilowatts (63.7 kW aural) and height above average terrain of 582 feet. On May 11, 1988, WACH was acquired by its present licensee. Within a month, WACH instituted a new, nonreligious program schedule and concluded an affiliation agreement with the Fox Broadcasting Company. WACH also upgraded the station's technical facilities, increasing the effective visual radiated power of the station to 5,000 kilowatts (500 kW aural) and height above average terrain to 633.04 feet, allowing WACH to provide Grade B service to Orangeburg, Newberry, and portions of Bishopville, South Carolina. These changes resulted in increases in total population and geographic area served of 16.64% and 22.2%, respectively. In 1990, WACH filed a petition for special relief, contending that in view of both the station's technical upgrades and the station's switch to a "general market independent station" format from a specialty station format, WACH should be considered a "new" station for purposes of determining its status as significantly viewed pursuant to §76.54 of the Rules. Consideration as a "new" station, WACH notes, would allow it to demonstrate its status as significantly viewed utilizing current county-wide data, rather than current community-specific data or county-wide data from the period 1981-1984, the station's first three years of operation as WCCT-TV. WACH's petition was opposed by WOLO-TV and by WCBD-TV. In *FCVS Communications, supra*, the staff denied WACH's request, noting:

> In those cases in which we have permitted stations already on the air to be treated as "new" for such purposes, the station in question did more than merely seek to offer programming thought to be more attractive to its existing potential audience base. Rather, the station underwent very extensive technical improvements which significantly increased its coverage potential . . . or, alternatively, the station switched from an STV or non-commercial mode of operation to a commercial mode of operation . . . changes which altered the basic terms of providing its broadcast service.

FCVS Communications, 6 FCC Rcd at 3671 (citations and footnote omitted). The staff decision went on to conclude that neither WACH's technical improvements nor its change in program content were of sufficient magnitude to consider WACH to be a "new" station, citing *KXTX, Inc.*, 6 FCC Rcd 68 (1990); *Nationwide Communications, Inc. (KITN)*, 6 FCC Rcd 52 (1990); *Boston Broadcasters, Inc.*, 42 FCC 2d 669 (1973). WACH now seeks review of this decision.

In support of its application for review, WACH contends that *KXTX, Inc., supra*, and *Nationwide Communications, Inc., supra*, were wrongly decided because the change in program content from specialty to nonspecialty does create a "new" station. This is substantiated, WACH claims, by its increased popularity, a function both of its new program content and also of the station's technical improvements, the combination of which warrant treatment as a "new" station. This would treat WACH equitably, maintains the station, with WOLO-TV and WCBD-TV, which achieved significantly viewed status in 1972 based on county-wide data.

In opposition to WACH, both WOLO-TV and WCBD-TV argue that the staff decision is correct, properly justified, and in accord with Commission precedent.

We see no reason to reverse the staff decision or our previous decisions. WACH's arguments concerning programming and equitable treatment are identical to those raised in *KXTX, Inc., supra*, and in *Nationwide Communications, Inc., supra*, and are equally unpersuasive. Determining the relative substantiality of changes in program format is the type of subjective judgment from which this Commission has sought to extricate itself. *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981). This is so whether or not such changes are buttressed by technical facilities improvements, which in WACH's case are insufficient for the relief requested. In this regard, we note that we have treated stations as "new" if they increased their Grade B service area in excess of 40%. We have consistently based such determinations on more than minimal signal coverage increases and possibilities of improved reception. In contrast, WACH has increased its Grade B coverage area by only 22.2% which does not approach the type of very extensive and atypical change on which previous waivers were based. *American Valley Broadcasting Company (WAFF)*, Cable Television Actions Report No. 3253 (released December 7, 1989); *Taft Television Radio Company, Inc.*, 103 FCC 2d 883 (1986).

In view of the foregoing, we find that grant of WACH's application is not in the public interest.

Accordingly, IT IS ORDERED, That the application for review (CSR-3464) filed July 22, 1991, by FCVS Communications IS DENIED.

This letter was adopted by the Commission on February 17, 1993.*

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

*Commissioner Marshall not participating.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-639

In re Applications of

TEXAS EDUCATIONAL BROADCASTING CO-OPERATIVE, INC.
Hornsby, Texas — File No. BPED-880401MG

THE UNIVERSITY OF TEXAS AT AUSTIN (TEXAS STUDENT PUBLICATIONS)
Austin, Texas — File No. BPED-880722MA

For Construction Permit for a
New Noncommercial Educational FM
Station on Channel 219A

ORDER

Adopted: February 19, 1993; Released: February 26, 1993

By the Review Board: MARINO (Chairman), BLUMENTHAL and GREENE.

1. The Board has before it a "Joint Request For Stay Of Proceeding" filed February 12, 1993 by the captioned parties. Therein, and pursuant to the status report required in our prior order in this proceeding,[1] the parties seek an additional sixty (60) days to consummate "an agreement in principle to share the frequency" already reached, but in need of formal ratification by the ultimate authority at each institution.

2. ACCORDINGLY, IT IS ORDERED, that the parties SHALL FILE their proposed settlement agreement within 60 DAYS of the release of this ORDER, and the Mass Media Bureau SHALL FILE its comments on the agreement no later than 10 DAYS thereafter.[2]

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

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[1] *See* 7 FCC Rcd 7525 (Rev. Bd. 1992).

[2] We do not, of course, grant a "stay" in a legal sense; the parties do not invoke the conditions of *Washington Metropolitan Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977), and even a forum cannot stay its own action in the absence of those conditions. *See U.S. v. Western Electric Co., et al.*, No. 91-5263 (D.C. Cir. Oct. 9, 1991)(*per curiam* order).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Southwestern Bell
Telephone Company

Petition for Waiver
of Section 69.105(b)(1)(i)
of the Commission's Rules

ORDER

Adopted: February 18, 1993; Released: February 26, 1993

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On September 4, 1992, Southwestern Bell Telephone (SWB) requested a "conditional" waiver of Section 69.105(b)(1)(i) of the Commission's Rules, 47 C.F.R. § 69.105(b)(1)(i).[1] The waiver would permit SWB to offer interexchange carriers an additional routing option for their "nonpremium" terminating traffic -- traffic which terminates in end offices that are not equipped with equal access capability. Under the option SWB proposes, an interexchange carrier could route its terminating nonpremium traffic from its point of presence to SWB's access tandem switches using tandem trunk groups which have been engineered to premium standards. Such traffic would be billed at premium rates. On September 16, 1992, the Common Carrier Bureau issued a Public Notice soliciting comments on SWB's request.[2] For the reasons discussed below, we grant SWB's waiver request.

II. BACKGROUND

2. Currently, all nonpremium Feature Group B (FGB) terminating traffic must travel from the interexchange carrier's (IXC's) point of presence to SWB's access tandem switches over the IXC's FGB tandem trunk groups. If we grant the requested waiver of Section 69.105(b)(1)(i), SWB could offer IXCs another routing option for their terminating FGB traffic. Under this option, an IXC could use its premium Feature Group D (FGD) tandem trunk groups to terminate FGB traffic at SWB's access tandem office. This would permit the customer to cease using its underutilized trunks. The traffic will then travel from the access tandem to its final destination in an office that is not converted to equal access. Traffic terminating in nonconverted end offices has traditionally required that carriers charge nonpremium rates under Part 69 of the Rules. SWB therefore requests a rule waiver in order to charge premium rates to IXCs that wish to route their nonpremium terminating traffic to SWB's access tandems over FGD trunks.

3. In its request, SWB contends that the quality of service provided to end user customers under this option will be almost identical to the service given to end user customers receiving premium traffic that terminates in an end office that has been converted to equal access. SWB Petition at 2-3. SWB next compares its request to its 1987 waiver request, which was granted by the Common Carrier Bureau.[3] In that order, the Bureau waived the then-current version of the rules to allow SWB to charge an IXC premium rates for traffic routed over trunk groups engineered to premium trunk group standards that originated in nonconverted end offices. SWB claims that the waiver request now before the Bureau is similar to its previous request, since both requests concern optional routing arrangements requested by at least one IXC. *Id.* Finally, SWB contends that approval of the waiver would expand the IXCs' service options and promote competition for services supported by common channel signalling. *Id.* at 3.

III. SUMMARY OF PLEADINGS

4. On October 6, 1992, Advanced Telecommunications Corporation (ATC) and LDDS Communications, Inc. (LDDS) filed joint comments opposing SWB's waiver request.[4] ATC and LDDS claim that traffic which terminates at a central office not equipped with equal access capability cannot be considered equal access traffic, and should not be subject to premium rates. ATC/LDDS Comments at 2. They also contend that, while SWB now seeks to provide an optional arrangement, grant of the waiver could provide a precedent for allowing LECs to require that FGD trunking arrangements be used to terminate nonpremium traffic and to charge premium rates in the future. Finally, ATC and LDDS argue that SWB has not substantiated its claim that an IXC is willing to pay premium rates for the option. *Id.* at 3-4.

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[1] Section 69.105(b)(1)(i) provides that an access customer "... shall be deemed to receive premium access if access is provided through a local exchange switch that has the capability to provide access for an MTS-WATS equivalent service that is substantially equivalent to the access provided for MTS or WATS..."

[2] Public Notice, Southwestern Bell Telephone Company Requests Waiver to Permit Interexchange Carriers to Request that Southwestern Bell Terminate Their FGB Traffic Over FGD Trunk Groups while Charging Premium Rates, 7 FCC Rcd 653 (Com.Car.Bur. 1992).

[3] In the Matter of Southwestern Bell Telephone Company, Petition for Waiver of Sections 69.205 and 69.206 of the Commission's Rules, Memorandum Opinion and Order, Mimeo No. 3581, released June 12, 1987.

[4] The ATC/LDDS comments were accompanied by a motion for leave to file one day late. ATC and LDDS claim that delivery of their comments was delayed while en route to the Commission because the individual making the delivery was delayed by traffic caused by an automobile accident. SWB was not disadvantaged in preparing its reply because it received its copy of the comments in the mail. Because the delay in filing of the ATC/LDDS comments was slight, and because neither the Commission's consideration of SWB's petition nor SWB's receipt of the comments was hindered, we grant their motion to accept the late-filed pleading.

5. SWB replies that its end offices ensure that premium traffic is routed over the correct trunks because originating calls will not automatically flow to interoffice FGD trunks at the access tandem. In the terminating direction, however, SWB argues that its end offices merely deliver the calls they receive from the access tandem to the end user customer regardless of whether the traffic is routed through FGB or FGD trunks. *Id.* at 3. Finally, SWB argues that the waiver, if granted, would not lead to mandatory premium rates for all incoming traffic any more than the previous waiver granted by the Bureau caused mandatory premium rates for all outgoing traffic. *Id.* at 4.

IV. DISCUSSION

6. We will grant SWB's waiver petition.[5] As SWB notes, the Bureau previously granted a waiver similar to the one SWB now requests. Further, if we deny its current waiver request, SWB will be unduly constrained in providing a new service option. On the other hand, granting the waiver will further the Commission's goals by increasing the number of options available to acess service customers and fostering competition for innovative new services. Moreover, according to SWB, at least one IXC is interested in taking this optional arrangement. Therefore, we conclude that strict compliance with the Part 69 rules would be inconsistent with the purpose behind the rules and should be waived in these circumstances.

7. Finally, we agree with ATC and LDDS in their assertion that, under the rules, the nature of the end office, not the type of trunking arrangement, determines whether traffic should be charged at premium rates. SWB, however, has properly asked the Bureau to waive those rules. We grant SWB's waiver only to the extent that SWB will offer the routing arrangement as an option. Because the arrangement is optional, IXCs that do not wish to pay premium rates will not be required to do so.[6]

V. ORDERING CLAUSES

8. IT IS ORDERED that the motion to accept the late-filed Comments of Advanced Telecommunications Corporation and LDDS Communications, Inc., IS GRANTED.

9. IT IS FURTHER ORDERED that the petition for waiver of Section 69.105(b)(1)(i) of the Commission's Rules, 47 C.F.R. § 69.105(b)(1)(i), filed by Southwestern Bell Telephone Company IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

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[5] The rules may be waived if there is "good cause" to do so. *See* Section 1.3 of the Commission's Rules, 47 C.F.R. Sec. 1.3. The Commission may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest. WAIT Radio v. FCC, 418 F.2d 1153, 1159 (D.C.Cir. 1969). Also, if the Commission grants waivers, it must identify and articulate reasonable standards that are predictable, workable, and not susceptible to discriminatory application. Northeast Cellular Telephone Company, L.P. v. FCC, 897 F.2d 1164, 1166 (D.C.Cir. 1990).

[6] Grant of this waiver should not be misconstrued as allowing SWB to require mandatory FGD arrangements at some later time.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re application of

WESTERN MAINE CELLULAR, INC. File No. 08288-CL-MP-92

For facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block B, in Market No. 463, Oxford, Maine

ERRATUM

Released: February 26, 1993

1. On July 15, 1992, Santa Barbara Cellular Systems, Ltd. (Santa Barbara) filed a non-wireline cellular application (File No. 07608-CL-MP-92) to add a new cell to its system in the Santa Barbara-Santa Maria-Lompoc Metropolitan Statistical Area (MSA). *See Public Notice*, Rep. No. CL-92-128, at p.4 (released Aug. 18, 1992). SLO Cellular, Inc., (SLO) filed a petition to deny the application. The Committee for Effective Cellular Rules (Committee) also filed a petition to deny the captioned application, among others. The Mobile Services Division denied the SLO and Committee petitions and granted Santa Barbara's application in *Western Maine Cellular, Inc.*, DA 92-1706, at para. 8 (released Dec. 23, 1992) (*Western Maine*).

2. Footnote nine (9) was inadvertently omitted in the *Western Maine* order. Accordingly, the order is corrected to add the footnote which reads as follows: "SLO filed a letter dated November 23, 1992, requesting withdrawal of its petition by virtue of a settlement." We have reviewed the merits of SLO's petition, however, notwithstanding its withdrawal.

FEDERAL COMMUNICATIONS COMMISSION

John Cimko
Chief, Mobile Services Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-432

In re Applications of

WELCH COMMUNICATIONS, INC. File No. BPH-870827MY

SWAN CREEK COMMUNICATIONS File No. BPH-870827NJ

For Construction Permit for
New FM Station, Channel 297A,
Swanton, Ohio

MEMORANDUM OPINION AND ORDER

Adopted: February 3, 1993; Released: February 26, 1993

By the Commission:

1. Before the Commission for consideration are applications for review of the Review Board's decision in *Welch Communications, Inc.*, 7 FCC Rcd 4542 (Rev. Bd. 1992), filed August 18, 1992 by Welch Communications, Inc. (Welch) and August 19, 1992 by Swan Creek Communications (Swan), respectively. In addition, an Opposition to Swan's application for review was filed on September 3, 1992 by Welch. The Board found both applicants unqualified to be Commission licensees based on their lack of truthfulness and candor and their failure to demonstrate that they were financially qualified.

2. We agree with the Board's disqualification of Swan and affirm the Board's decision as it pertains to Swan. However, as to Welch we believe the record demonstrates that it has reasonable assurance of financing sufficient to cover the cost of constructing and operating the proposed station for three months from the Broadcast Capital Fund (Broadcap), and that it did not lack candor or make misrepresentations to the Commission concerning its financial qualifications. Accordingly, we will grant its application.

I. WELCH -- FINANCIAL QUALIFICATIONS

3. Charles Welch, President and 50% shareholder in the applicant when Welch filed its application, originally testified that he had certified Welch's financial qualifications based on three different financial sources: (1) a loan letter from Broadcap, (2) a fund commitment from the Community Development Center (CDC) (50% shareholder in Welch) and (3) his own personal funds.

4. CDC subsequently withdrew from the application and Charles Welch indicated that he did not intend to rely on his personal funds to prosecute the application but borrowed money from his father-in-law and from a friend to prosecute this application. FCC Rcd at 4543 ¶ ¶ 10-11. During subsequent hearings pertaining to the financial qualification issue, Charles Welch testified that the sole basis for Welch's financial certification in its application was a letter dated August 25, 1987 from Broadcap.

5. The letter from Broadcap indicated that, based on a review of Welch's request, Broadcap was willing to lend $200,000-$250,000 to Welch providing Welch is ultimately successful in obtaining FCC approval to construct and operate the station and that Welch is able to meet all reasonable and ordinary credit criteria of Broadcap at the time the money is actually requested. The letter also stated that the rate of interest would be contingent upon the conditions prevailing at the time the loan was extended; interest only would be paid for the first three years; and the loan would be collateralized with the assets of the station ("and may be further secured by corporate and/or personal guarantees of shareholders"). The letter stated that it was not intended as a legal commitment from Broadcap, but was intended "to provide Welch Communications, Inc. and the FCC with a reasonable assurance that these funds will be made available on the terms stated for the purpose of constructing and operating the proposed station." The letter was signed by Kenneth O. Harris, Vice President of Broadcap.

6. A second letter from Broadcap was written on March 29, 1989, after CDC had withdrawn from the application. Again, Broadcap indicated its willingness to loan Welch the same amount on basically the same terms as before. The only additional provision was a stock warrant interest in Welch of up to 30%. This letter was signed by Victor H. Brown, Broadcap's Vice President - Finance.

7. Both the ALJ and the Board found these letters to be no more than letters of accommodation falling far short of that required to demonstrate reasonable assurance of the availability of the needed funds. The Board stated that the test for having reasonable assurance of committed sources of funds from a lending institution consists of the following alternative factors:

> 1. the bank has a long and established relationship with the borrower sufficient to infer that the lender is thoroughly familiar with the borrower's assets, credit history, current business plan, and similar data; or,
>
> 2. the prospective borrower has provided the bank with such data, and the bank is sufficiently satisfied with this financial information.

7 FCC Rcd at 4544 ¶ 14, citing *Scioto Broadcasters Limited Partnership*, 5 FCC Rcd 5158, 5160 (Rev. Bd. 1990), rev. denied, 6 FCC Rcd 1893 (1991).

8. The ALJ found it significant that Welch had not provided Broadcap with a personal financial statement or any other financial document and that Broadcap has never asked him for any. Moreover, although Welch tesified that he had made some written calculations about what the costs would be to construct and operate the station for three months, no document regarding his proposal was presented to Broadcap. 7 FCC Rcd at 4543 ¶ 8. It was for these reasons that the Board held that Welch had failed to meet the *Scioto* test. 7 FCC Rcd at 4545 ¶ 17.

9. However, upon further analysis of the record in this proceeding and the cases cited, it appears that Welch did everything required of a borrower to obtain a loan from Broadcap that it could do prior to receiving a construction permit from the Commission and therefore that the letters

from Broadcap provide sufficient reasonable assurance of financing to warrant reliance on them in the certification of Welch's financial qualifications.

10. Victor H. Brown, Vice President - Finance of Broadcap, and the author of the March 29, 1989 letter to Welch, testified that Broadcap's existence stems from a recognition that minorities are not likely to have traditional financing sources available to them. Therefore, Broadcap does not consider the submission of personal financial information essential to its determination of whether to extend a loan to an applicant. (Tr. 616-619). Mr. Brown explained that the criteria for determining whether Broadcap will make a loan to a company is, first, whether the applicant is at least 51% minority owned and, second, whether the applicant has broadcast managerial experience in the market or a similar market. (Tr. 616). Mr. Brown also testified that, although a determination as to the viability of a particular market for a new station is also important, the submission of a business plan by the applicant is not essential to that determination because Broadcap conducts its own market analysis. (Tr. 619). Accordingly, when asked whether Broadcap normally requires a written equipment proposal from an applicant, Mr. Brown explained that it was not necessary because Broadcap has 10 years of experience and has independent, reliable sources of information from which it can obtain reasonable estimates. (Tr. 635). Furthermore, Mr. Brown testified that the letter of August 25, 1987 was similar to letters that Broadcap would normally write for applicants for new FM stations. (Tr. 633).

11. Charles Welch testified that he had met with Broadcap and explained his proposal which would require a loan of approximately $175,000 to $200,000 to construct and operate a new FM station in Swanton. (Tr. 689, 702). This is consistent with Mr. Brown's testimony. Moreover, Mr. Brown acknowledged having met Mr. Welch in connection with an earlier application for funds to purchase a Toledo, Ohio station. (Tr. 631). In light of the above, it is apparent that Mr. Welch did all he was requested to do and that Broadcap, proceeding in accordance with its normal policy and practice, found Welch to be a minority applicant with broadcast management experience and approved the issuance of a loan commitment not to exceed $250,000 based on Welch being awarded a construction permit and meeting other general conditions. See Broadcap letter dated August 25, 1987.

12. Although Broadcap had dealt with Charles Welch before, the record does not establish whether or not those dealings would be sufficient to satisfy the first factor of the *Scioto* test. However, we do find that Welch's eligibility to participate in this program, plus Broadcap's independent determination that Swanton was a sufficiently viable market to enable it to offer a loan of up to $250,000, provides an ample basis for a conclusion that *Scioto's* second factor has been met. Broadcap was established to assist disadvantaged individuals, such as Charles Welch, to obtain broadcast facilities. The record shows that the financial circumstances of the applicant is not a significant element in Broadcap's determination of whom to loan money and that no further steps were required on the part of Welch to insure Broadcap's participation in this venture. We find, on the basis of the record before us, that Welch has affirmatively demonstrated reasonable assurance of the availability from Broadcap of sufficient funds to construct and operate the proposed FM station in Swanton, Ohio for three months. We, therefore, reverse the decisions below, and hold that Welch has demonstrated it is financially qualified to be a Commission licensee.

II. WELCH -- LACK OF CANDOR/MISREPRESENTATION

13. Notwithstanding Welch's reasonable assurance of financing from Broadcap, we are still left with a question of whether Welch lacked candor and misrepresented its financial qualifications to the Commission. The ALJ found Welch misrepresented his financial qualifications because the CDC fund commitment was nonexistent, the Broadcap letter was "merely an accomodation," and Charles Welch had to borrow funds from his father-in-law and a friend in order to personally prosecute the application. *Welch Communications, Inc.*, 7 FCC Rcd 568, 573 ¶ 5 (Admin. LJ 1992). As to Broadcap, the ALJ held that Welch knew that nothing firm had been set up because it had not given Broadcap its personal financial statement or any written budget or cost estimates. 7 FCC Rcd at 573 ¶ 7. In light of our finding that Welch's failure to supply a written financial statement or a written budget with estimated costs of construction and three months operation was immaterial to Broadcap's provision of reasonable assurance of adequate funds to Welch, Welch's failure to offer such documents does not provide an adequate basis for a determination that Welch misrepresented its financial qualifications to the Commission.

14. The Board agreed with the ALJ's reasoning for finding that Welch had misrepresented its financial qualifications but also stated the following:

> Charles Welch's own testimony reveals . . . that he *knew* Broadcap's letter was a worthless accommodation because, upon learning of CDC's abrupt withdrawal several months subsequent to receiving the Broadcap letter, he was "devastated," and actually went to two other financial institutions to (unsuccessfully) seek other funding.

7 FCC Rcd at 4545 ¶ 17 (Emphasis in original). In its application for review, Welch submits that the reason Charles Welch testified that he was devastated due to CDC's withdrawal related to Charles Welch's perception of the adverse effect the withdrawal would have on Welch's integration proposal rather than the loss of its financial support. Moreover, Welch argues that the contact with the banks was simply to seek alternative financing for the whole project, including prosecution expenses. On the basis of the record before us, we are unable to agree with the Board's assessment that the only motive Charles Welch could have had for stating he was devastated by CDC's withdrawal and approaching two banks was the knowledge (or even belief) that Welch was not otherwise financially qualified. Rather, after review of the record before us, we conclude that Welch has provided a reasonable and credible explanation for the matters in question.[1] Thus, we

[1] We also find no significance in Welch's purported contradiction as to the sources of funding for the new station. See 7 FCC Rcd at 4544 ¶ 15. Charles Welch testified in a deposition that he had based Welch's financial certification on three sources -- CDC, his personal funds and Broadcap. However, during the remand hearing he stated that the August 25, 1987 letter from

reverse the findings below that Welch was guilty of lack of candor or misrepresentation concerning its financial proposal.

15. Because we affirm the Board's disqualification of Swan and because there are no other matters bearing on Welch's qualifications to be a Commission licensee, we find that the public interest will be served by the grant of Welch's application to construct a new FM station in Swanton, Ohio.

16. ACCORDINGLY, IT IS ORDERED, That, pursuant to 47 C.F.R. § 1.115(g) the Application for Review filed August 19, 1992 by Swan Creek Communications IS DENIED.

17. IT IS FURTHER ORDERED, That the Application for Review filed August 18, 1992 by Welch Communications, Inc. IS GRANTED, the Decision of the Review Board in this proceeding, 7 FCC Rcd 4542, as it pertains to Welch Communications, Inc., IS SET ASIDE, and the application of Welch Communications, Inc. (File No. BPH-870827MY) IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Broadcap was the sole source of Welch's financial certification. In light of our finding that Welch had reasonable assurance from Broadcap of sufficient funds to construct and operate the station for three months, it appears that Welch's initial reliance on CDC and his own funds were for other financial support in connection with the proposal, e.g., prosecution expenses, not essential to the certification requested in the application. Although indicative of hoped for sources of funding for the station, those additional sources were superfluous in terms of the needed funds for Welch's financial certification. Thus, the discrepancy noted by the Board was harmless and does not warrant a finding of lack of candor.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US SPRINT COMMUNICATIONS LIMITED PARTNERSHIP, Complainant,

v.

PACIFIC NORTHWEST BELL TELEPHONE COMPANY,	File No. E-89-368
MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,	File No. E-89-369
NORTHWESTERN BELL TELEPHONE COMPANY,	File No. E-89-370
PACIFIC BELL TELEPHONE COMPANY, and	File No. E-89-378
SOUTHERN NEW ENGLAND TELEPHONE COMPANY, Defendants.	File No. E-89-380

MEMORANDUM OPINION AND ORDER

Adopted: January 29, 1993; Released: March 2, 1993

By the Commission:

TABLE OF CONTENTS

Topic	Paragraph No.
I. INTRODUCTION	1
II. BACKGROUND	2 - 4
III. DISCUSSION	5 - 51
A. Liability for Damages	5 - 17
1. Contentions of the Parties	5 - 11
2. Discussion	12 - 17
B. Damages and Interest Claims	18 - 51
1. Damages	19 - 48
a. Contentions of the Parties	19 - 30
b. Discussion	31 - 48
2. Interest on Damages	49 - 51
a. Contentions of the Parties	49 - 50
b. Discussion	51
IV. CONCLUSION	52
V. ORDERING CLAUSES	53 - 58

I. INTRODUCTION

1. In this Memorandum Opinion and Order we find that US Sprint Communications Limited Partnership (Sprint)[1] has met its burden of establishing that defendant local exchange carriers (LECs) have violated Section 201(b) of the Communications Act by earning in excess of the rate of return prescribed by the Commission for the period October 1, 1985 through December 31, 1986. In addition, we award Sprint damages and interest for defendants' rate of return violations.

II. BACKGROUND

2. The Commission has previously held that LECs who had earned in excess of the prescribed rate of return for October 1, 1985 through December 31, 1986 violated Section 201(b) of the Communications Act (the "Act").[2] These decisions firmly establish that carrier rates producing earnings in excess of the Commission's prescribed rate of return violate Section 201(b) of the Act[3] and allegations of such overearnings are sufficient to sustain a cause of action under Section 208 of the Act.[4] Furthermore, the Commission has held that complainants may recover damages, including interest, from LECs who violated the Commission's rate of return prescription.[5]

3. While a detailed accounting of the applicable statutory scheme and relevant Commission and court decisions that preceded the filing of the captioned complaints is set forth in the *MCI Liability Order*[6] and will not be repeated here, a very brief review of the relevant rate of return prescription is helpful. The Commission prescribed a rate of return of 12.75 percent for the initial monitoring period of October 1, 1985 through December 31, 1986.[7] Because the initial

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[1] We note that Sprint has changed its name from US Sprint Communications Company Limited Partnership to Sprint Communications Company L.P. We will use the company name employed in the original complaints.

[2] MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co., *et al.*, 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon. denied*, 5 FCC Rcd 3463 (1990) (*MCI Reconsideration Order*) (jointly "*MCI Orders*"), *appeal dismissed sub nom. Mountain States Tel. and Tel. Co., et al. v. FCC*, 951 F.2d 1259 (10th Cir. 1991) (per curiam); and American Telephone and Telegraph Co. v. Northwestern Bell Telephone Co., 5 FCC Rcd 143 (1990), *appeal dismissed sub nom. Mountain States Tel. and Tel. Co., et al. v. FCC*, 951 F.2d 1259 (10th Cir. 1991) (per curiam).

[3] 47 U.S.C. § 201(b). This Section provides, in pertinent part, that "[a]ll charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful."

[4] 47 U.S.C. § 208.

[5] MCI Telecommunications Corporation v. Pacific Bell Telephone Company, *et al.*, FCC 93-70 (released February 8, 1993) (*MCI Damages Order*).

[6] *MCI Liability Order*, 5 FCC Rcd at 217-18.

[7] *See* Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985) (*Phase I Order*), *on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,033 (Apr. 1, 1986) (*Phase I Reconsideration*), *on further reconsideration*, 2 FCC Rcd

review period would be only 15 months rather than the two years of subsequent review periods, the Commission expanded the "buffer"[8] that would be used during this initial monitoring period to determine whether the prescription had been violated.[9] Carriers were given notice that a 13.10 percent level of earnings would be the maximum allowable rate of return on overall interstate earnings and 13.25 percent would be the maximum allowable return for any access service category.[10]

4. In September 1989, Sprint filed thirteen formal complaints[11] against the LECs alleging violation of the Commission's rate of return prescription.[12] In addition, Sprint reserved the right to file supplemental complaints for damages as provided for in Section 1.722 of the Commission's rules[13] because it could not determine the precise amount of damages it suffered at the time its complaints were filed.[14] The defendants all filed answers; the majority of defendants also filed motions to dismiss.[15] On June 9, 1992, the Common Carrier Bureau (Bureau) released an order establishing discovery and briefing schedules.[16] Pursuant to the *Discovery Order*, the parties submitted their initial briefs and reply briefs setting forth their respective claims and arguments.[17]

III. DISCUSSION

A. Liability For Damages

1. Contentions of the Parties

5. Sprint alleges that the rates it paid for certain of the defendants' interstate access services during the period from October 1, 1985 through December 31, 1986 were unjust and unreasonable in violation of Section 201(b) of the Act. Sprint supports its allegations with evidence taken from reports filed with the Commission by the defendants for the 15-month period at issue that show that defendants achieved earnings in excess of the Commission's prescribed

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190 (1987) (jointly "*Phase I Orders*"). *See also* Procedures and Methodologies to Establish Reporting Requirements, CC Docket No. 86-127, FCC 86-514 (released Dec. 3, 1986), 52 Fed. Reg. 273 (Jan. 5, 1987).

[8] *See MCI Liability Order*, 5 FCC Rcd at 217:

> ... the Commission established both an authorized rate of return and a 'spread' or 'buffer' above that return for use in proceedings relating to the enforcement of the prescription. In other words, the authorized return would be employed in computing tariff rates; the spread, or buffer, would be used in combination with the authorized return 'to determine whether a rate of return prescription had been violated.' [footnote omitted.]

[9] *Phase I Order*, 50 Fed. Reg. at 41,352 (para. 21).

[10] 47 C.F.R. § 65.701(b).

[11] Eight of the complaints have since been settled with the LECs involved. *See* US Sprint Communications Limited Partnership v. The Diamond State Company, The Chesapeake and Potomac Telephone Companies, and New Jersey Bell Telephone Company, 7 FCC Rcd 1397 (Com.Car.Bur. 1992); US Sprint Communications Company Limited Partnership v. Southern Bell Telephone and Telegraph Company and South Central Bell Telephone Company, 6 FCC Rcd 5579 (Com.Car.Bur. 1991); US Sprint Communications Company Limited Partnership v. Michigan Bell Telephone Company and Wisconsin Bell, Inc., 6 FCC Rcd 5210 (Com.Car.Bur. 1991); US Sprint Communications Company Limited Partnership v. Southwestern Bell Telephone Company, 5 FCC Rcd 4568 (Com.Car.Bur. 1990).

[12] The remaining defendants are, Pacific Northwest Bell Telephone Company (PNB), Mountain States Telephone and Telegraph Company (MTN), and Northwestern Bell Telephone Company (NWB), (collectively "USWC"); Pacific Bell Telephone Company (Pacific Bell); and Southern New England Telephone Company (SNET).

Due to the similarity of the issues and arguments raised by the remaining parties, the complaints have been consolidated for disposition. These complaints were held in abeyance by the Commission pending resolution of a court remand in *Illinois Bell Tel. Co. v. FCC*, 911 F.2d 776 (D.C. Cir. 1990). *See* US Sprint Communications Limited Partnership v. Pacific Northwest Bell Telephone Company, *et al.*, 6 FCC Rcd 640 (Com.Car.Bur. 1991). The Commission acted on the remand in October 1991. *See* Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, Decision on Remand, CC Docket No. 86-497, 7 FCC Rcd 296 (1991), *appeal docketed sub nom. Illinois Bell Telephone Co., et al. v. FCC*, No. 90-1020 (D.C. Cir. Jan.11, 1991). In December 1991, the Bureau released an order that reactivated the instant cases. *See* Order, 6 FCC Rcd 7295 (Com.Car.Bur. 1991).

[13] 47 C.F.R. § 1.722.

[14] Sprint also requested that the Commission issue Show Cause Orders against the defendants.

[15] Pacific Bell filed an answer, but did not file a motion to dismiss.

On February 13, 1992, USWC filed a supplement to its motion to dismiss (USWC Supplement). Sprint filed an opposition on February 27, 1992, and USWC replied on March 6, 1992. We will accept the USWC Supplement for filing since Sprint has had opportunity to respond.

[16] US Sprint Communications Limited Partnership v. Pacific Northwest Bell Telephone Company, *et al.*, 7 FCC Rcd 3584 (Com.Car.Bur. 1992) (*Discovery Order*). Sprint served interrogatories on defendants on June 19, 1992. Pacific Bell and SNET responded on July 8, 1992; USWC responded on July 9, 1992 with an erratum filed on July 20, 1992 and another erratum filed on August 24, 1992. USWC served interrogatories on Sprint to which Sprint responded on July 9, 1992. Sprint filed its brief on July 29, 1992 (Sprint Br.). The defendants also filed their briefs on July 29, 1992 (USWC Br., Pacific Bell Br., and SNET Br.). Sprint filed its reply brief on August 10, 1992 (Sprint RBr.) as did the defendants (USWC RBr., Pacific Bell RBr., and SNET RBr.).

[17] As a preliminary matter, we note that USWC has stated that it filed its brief directly with the Commission because it could find no order delegating damages authority to the Bureau. In addition, USWC formally objects if the Bureau is deciding these cases under delegated authority because it contends that the Bureau has been performing investigative and prosecutorial functions in these proceedings and cannot, under Section 554(d) of the Administrative Procedure Act (5 U.S.C. § 554(d)), act as decision maker here. USWC Br. at 2, n.7. While we agree with USWC that the damages issue must be decided by the Commission, 47 U.S.C. § 155(c)(1), the Bureau may deal with interlocutory matters such as discovery issues. We also disagree with USWC's characterization of the Bureau's activities regarding these complaint proceedings. The Bureau has at all times been acting as the "decision maker" and not as an "investigator" or "prosecutor."

rate of return on one or more of the three interstate access categories established for the purpose of enforcing that rate of return prescription.[18]

6. Sprint requests that the Commission declare that the defendant LECs' charges for the period from October 1, 1985 through December 31, 1986 are in violation of the rate of return prescription and Section 201(b) of the Act, and order the defendant LECs to pay damages to Sprint equal to the difference between the amount actually paid by Sprint for interstate access service during the period and the amount that Sprint would have paid if the defendants' charges earned no more than the maximum allowable rate of return, plus interest.

7. The defendants raise a number of issues that have been fully considered by the Commission in the *MCI Orders*. They will be briefly discussed below.[19]

8. Defendants advance a variety of arguments to support their claim that Sprint has failed to state a cause of action under the Act.[20] Primarily, the defendants argue that Sprint's claims are barred by *American Telephone and Telegraph v. FCC*.[21] The defendants contend that renaming a "refund" as a "damage award" does not cure the inconsistencies the court found with respect to the automatic refund rule and allow the awarding of damages in the instant complaints.[22] The defendants argue that the Commission must consider underearnings in determining whether particular overearnings are in violation of the Act.[23] Additionally, some defendants argue that *AT&T v. FCC* precludes the Commission from finding damages on a category by category basis.[24] Finally, the defendants argue that it is contrary to *AT&T v. FCC* to find a rate of return

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[18] The interstate access service categories are special access, common line, and switched traffic sensitive. *See* 47 C.F.R. § 65.702. Sprint states that the monitoring reports recite that for the period October 1, 1985 through December 31, 1986: PNB earned a return of 15.09% in the special access category in Idaho and a return of 14.76% in the switched traffic sensitive category in Oregon; MTN earned returns in the switched traffic sensitive category of 14.60% in Arizona, 15.81% in Idaho, 15.20% in Montana, 14.97% in New Mexico, 13.67% in Utah and 14.93% in Wyoming; NWB earned returns in the special access category of 14.31% in Iowa, 13.85% in Minnesota, 13.63% in Nebraska and 16.01% in North Dakota and earned returns in the switched traffic sensitive category of 14.64% in Iowa, 14.33% in Minnesota, 15.79% in Nebraska and 19.71% in North Dakota; Pacific Bell earned a return of 14.51% in the switched traffic sensitive category; SNET earned a return of 14.12% in the switched traffic sensitive category.

[19] The issues and arguments raised by defendants in response to Sprint's claims are essentially identical. For the sake of convenience and clarity, we will refer to defendants' arguments as if they are part of the same pleading. To the extent that individual defendants raise separate or unique arguments, we will address them separately.

[20] We note that Pacific Bell contends that Sprint's claims are barred by a settlement agreement entered into between the parties in September 1987. Pacific Bell Answer at para. 25. Pacific Bell argues that the agreement settled all outstanding billing disputes and claims arising before September 1987, thereby discharging defendant's liability for any claims regarding access services during the period covered by the agreement, known either at the time of the agreement or later. Sprint responds that the agreement only discharges Pacific Bell from any action regarding specific billing disputes over access usage by Sprint. *See* Sprint Reply at 5-8. Sprint contends that the agreement does not address the lawfulness of the defendants' tariff rates under the Act nor does it relinquish Sprint's right to receive damages for rates later declared unlawful. After review of the agreement, we are not persuaded by Pacific Bell's claims that the settlement agreement with Sprint precludes any claims for damages based on Pacific Bell's rate of return violations. On its face, the agreement appears to release Pacific Bell from claims stemming from particular disputes over billed amounts as described in the agreement. There is no indication that the agreement was intended to release defendants from any claims stemming from the lawfulness of the tariffed rates assessed. Therefore, in the absence of any evidence that the settlement agreement was intended to cover claims such as those raised in Sprint's complaint, we do not find that the settlement agreement bars the complaint.

[21] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court invalidated the Commission's procedure to enforce its rate of return prescriptions through automatic refunds of carrier overearnings to customers. For a detailed discussion of *AT&T v. FCC*, *see MCI Liability Order*, 5 FCC Rcd at 221-223. The U.S. Court of Appeals for the Sixth Circuit, relying on *AT&T v. FCC*, vacated a Commission order dealing with refunds of earnings in excess of the authorized rate of return for the special access category over a period of years in the context of a strategic pricing investigation. *See Ohio Bell Tel. Co. v. FCC*, 949 F.2d 864(6th Cir. 1991) (*Ohio Bell*) . The court primarily relied upon the statement from *AT&T v. FCC* that a rate of return prescription is both a minimum and a maximum prescription. *See AT&T v. FCC*, 836 F.2d at 1390. The Commission has clarified, however, that it does not view a rate of return prescription as both a maximum and a minimum and has stated that

> [o]ur accumulated experience with rate of return prescriptions, and our review of the cost of capital evidence in this proceeding, convince us that there is no such point. * * * We believe there is a substantial gap between an earnings level that is fully adequate to assure attraction of capital on favorable terms, and an earnings level which, if sustained over time, would be confiscatory.

Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, 5 FCC Rcd 7507, 7532 (1990), *appeal docketed sub nom. Illinois Bell Tel. Co., et al. v. FCC*, No. 90-1020 (D.C. Cir. Jan. 11, 1991).

[22] *See, e.g.*, Pacific Bell Br. at 7-8.

[23] *See, e.g.*, PNB, MTN, and NWB's Joint Answer, Affirmative Defenses, Contingent Cross Complaint and Motion to Dismiss (USWC Joint Motion) at paras. 15-17. In addition, to the extent that the Commission upholds Sprint's complaints, USWC claims in a contingent cross complaint that it is entitled to damages from Sprint to compensate for underearnings in some access categories. USWC Joint Motion at para. 21. We discussed a similar contingent cross complaint in the *MCI Liability Order* and concluded that the complaint provisions of the Act do not provide a remedy for a carrier to file a cross complaint against a customer, which Sprint is under these circumstances. *MCI Liability Order*, 5 FCC Rcd at 228, n.60. USWC's contingent cross complaint will therefore be dismissed. We have determined, however, that it is appropriate to look at Sprint's purchases of other access services to determine Sprint's damages for defendants' rate of return violations.

[24] *See, e.g.*, SNET Motion to Dismiss at 4.

violation when overall earnings for interstate access service did not exceed 13.10 percent regardless of access category earnings in excess of 13.25 percent.[25]

9. Defendants also argue that the Commission is engaging in retroactive ratemaking should it order a carrier to make refunds solely because the carrier has exceeded the authorized rate of return.[26] Additionally, Pacific Bell argues that the Commission's action in CC Docket No. 84-800 did not create a private cause of action that would permit an individual remedy.[27] PNB, MTN, and NWB also argue that rates charged in conformity with a lawfully filed tariff cannot then be found to be unjust and unreasonable merely because they later proved to be too profitable.[28]

10. Each of the defendants argues that all of Sprint's claims are barred by Section 415 of the Act, which establishes a two-year statute of limitations on the filing of complaints.[29] According to the defendants, Section 415 bars the recovery of any damages if sought more than two years after the occurrence of any overearnings, in this case, thus barring all recovery sought after December 31, 1988.[30]

11. Defendants also argue that the decision in *Ohio Bell,* issued after the release of the *MCI Liability Order,* requires dismissal of Sprint's complaints.[31] According to the defendants, *Ohio Bell* reaffirms the proposition established in *AT&T v. FCC* that the Commission cannot award damages for carrier overearnings without allowing the carrier to re-coup or off-set underearnings.[32] Defendants contend that these propositions are not confined to the Commission's ratemaking activities under Sections 204-205 of the Act[33] but are equally applicable when the Commission decides private complaints for damages under Section 208 of the Act.

2. Discussion

12. We have carefully examined the record before us and conclude that the defendants have cited no facts and have made no arguments here that would warrant a ruling contrary to the *MCI Orders.*

13. *Failure to State a Cause of Action:* In the *MCI Liability Order,* we rejected identical claims made by some of the same defendants and held that *AT&T v. FCC* establishes no precedent that bars an individual complainant from seeking a remedy under Section 208 of the Act for damages based on a carrier's reported overearnings.[34] We stated that

> we are not persuaded by defendants' claims that earning in excess of prescribed rate of return does not violate that Act or, if it does, that the Commission *is required* to take a carrier's underearnings as well as its overearnings into account in determining whether a violation has occurred.
>
> * * * * * * * *
>
> We find that a valid prescription bound the defendants to a maximum earnings limitation, and the defendants admit that they earned in excess of the amount during the period in question.[35]

We found further that *AT&T v. FCC* did not govern Section 208 complaint proceedings. The Commission has the authority to order a carrier to pay damages if a complainant meets the burden of establishing both a violation of the Act and the actual injury.[36]

14. In addition, we have previously held that enforcement of a rate of return prescription is not retroactive ratemaking because the obligation being enforced was set prospectively when the prescription was adopted.[37] We also reject defendants' claims that the decision in *Illinois Bell* leaves the Commission only with Section 205 authority in the face of a violation of our rate of return prescription. As we explained in the *MCI Damages Order, Illinois Bell* addresses the Commission's authority under Section 204, not Section 208 of the Act.[38]

15. We have also rejected the contention that rates charged in conformity with a lawfully filed tariff cannot be unjust and unreasonable.[39] We point out that the issue is not the lawfulness of high profits in the abstract, but the lawfulness of profits in excess of a prescription. Accordingly we hold that, taking into account the buffer, profits in excess of a prescription are unjust and unreasonable.

16. *Statute of Limitations:* Sprint is correct in its assertion that it had until September 30, 1989 to file its complaints based on monitoring reports filed by defendants with the Commission on September 30, 1987.[40] We have previously held that the date of the filing of the final monitoring report is dispositive with regard to the date a complainant discovers the right or wrong or the facts on which such

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[25] *See, e.g.,* SNET Answer at 5. Extending this argument even further, PNB, MTN, and NWB contend that the key rate of return with which Sprint should be concerned is the overall earnings of USWC in the aggregate, not the individual categorical earnings of USWC's subsidiaries. In the aggregate, USWC earned 12.73% overall. USWC Joint Motion at para. 14.

[26] *See, e.g.,* USWC Br. at 7. Pacific Bell and SNET argue specifically that under *Illinois Bell Tel. Co. v. FCC,* 966 F.2d 1478 (D.C. Cir. 1992) (*Illinois Bell),* the Commission may only order prospective relief under Section 205 unless the investigative and accounting requirements of Section 204(a) have been met. Pacific Bell Br. at 10-11; SNET Br. at 7.

[27] Pacific Bell Br. at 14-17.

[28] USWC Joint Motion at para. 18.

[29] Section 415 provides, in pertinent part, that "[a]ll complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after...." 47 U.S.C. § 415(b). The term "overcharges" is defined in Section 415 "to mean charges for services in excess of those applicable thereto under the schedules of charges lawfully on file with the Commission." 47 U.S.C. § 415(g).

[30] *See, e.g.,* USWC Joint Motion at para. 19.

[31] USWC Supplement at 2; Pacific Bell Br. at 6-7; SNET Br. at 5-7.

[32] Pacific Bell Br. at 7.

[33] 47 U.S.C. §§ 204-205.

[34] *MCI Liability Order,* 5 FCC Rcd at 222-23.

[35] *Id.* at 223 [emphasis in the original].

[36] *Id.* at 222-23.

[37] *Id.* at 222.

[38] *See MCI Damages Order* at para. 27.

[39] *MCI Liability Order,* 5 FCC Rcd at 222.

[40] Sprint cites to the Bureau's Show Cause Orders in both the AT&T and MCI proceedings to support its argument. *See, e.g.,* MCI Telecommunications Corp. v. Michigan Bell, *Order to Show Cause,* 4 FCC Rcd 6099, 6101, n.8. This holding was subsequently adopted by the Commission. *See MCI Liability Order,* 5 FCC Rcd at 224-25.

knowledge is chargeable as a matter of law.[41] Defendants have made no argument that persuades us to alter this holding. Section 415 does not bar Sprint's complaints.

17. *AT&T v. FCC and Ohio Bell:* We disagree with the defendants' claim that *Ohio Bell* and *AT&T v. FCC* compel us to dismiss Sprint's complaints. As we emphasized in the *MCI Liability Order* and reaffirmed in the *MCI Damages Order,* automatic refunds and refunds ordered under Section 204 of the Act are different from individual actions for damages under Section 208. Unlike the automatic refund mechanism in *AT&T v. FCC* or the refund procedure in *Ohio Bell,* both of which resulted from rulemaking proceedings initiated at the Commission's discretion, individual actions for damages under Section 208 are initiated by private parties seeking damages for injuries to themselves; those private parties have the burden of establishing both a violation of the Act and actual injury.[42] The courts in *AT&T v. FCC* and *Ohio Bell* did not discuss private complaints for damages; they did not invalidate private actions for damages; and their holdings are not applicable to the different, separately authorized complaint procedure set forth in Sections 206-209. Accordingly, those decisions do not require us to depart from our holding in the *MCI Liability Order* that defendants have violated the Communications Act by earning in excess of a valid rate of return prescription, thereby making their rates unjust and unreasonable under Section 201 of the Communications Act and themselves liable for damages to the extent a complainant can establish that it was damaged as a result of the violation.[43]

B. Damages and Interest Claims

18. Sprint's damages claims rest primarily on the contention that the proper measure of damages it incurred as a result of the defendants' rate of return prescription violations is the difference between the amounts it actually paid the defendants for interstate access services during the October 1, 1985 through December 31, 1986 monitoring period and the amount it would have paid if the defendants' rates produced earnings that did not exceed the Commission's prescription. The defendants, however, have raised a number of challenges to Sprint's damages claims, including a number of arguments that were previously considered and rejected by the Commission in the *MCI Liability Order* and the *MCI Damages Order.* We address the parties' contentions below.

1. Damages

a. Contentions of the Parties

19. As referenced above, Sprint's damages claims rest primarily on the contention that the proper measure of the damages it incurred as a result of defendants' violations is the difference between the amount it actually paid defendants for interstate access services during the October 1, 1985 through December 31, 1986 period and the amount it would have paid if the defendants' rates had produced earnings that did not exceed the Commission's prescribed rate of return. In the *Discovery Order,* the Bureau stated that it tended to agree, in principle, that a possible measure of the damages stemming from defendants' rate of return violations could be that difference.[44] The Bureau was not persuaded on the record before it, however, that a damages determination based solely on such a measure necessarily reflected actual damages incurred by Sprint.[45] The defendants were invited to submit evidence that could serve to mitigate or otherwise reduce Sprint's damages claims. Specifically, the Bureau stated that evidence demonstrating that Sprint's share of excessive earnings realized in a particular access category by a defendant could be offset or otherwise reduced due to facts and circumstances surrounding Sprint's purchase of other interstate access services from such defendant for the relevant monitoring period might be relevant.[46]

20. Sprint contends that it should be awarded damages of $951,900 from USWC,[47] $1,542,200 from Pacific Bell, and $93,100 from SNET, exclusive of interest. To derive the stated amounts, Sprint first calculated, for each study area and access service category in which a defendant's earnings exceeded the rate of return prescription of 12.75% plus .50% buffer, an estimate of what the defendants' net earnings would have been had they earned the maximum authorized rate of return of 13.25%. Sprint then subtracted this amount from the defendants' actual net earnings as reported in the defendants' monitoring reports to determine the defendants' after-tax overearnings. The difference was then "grossed up" to reflect tax adjustments and multiplied by Sprint's share of the billed access revenues to arrive at Sprint's base damages claim.[48] Sprint also claims interest calculated at the maximum allowable rate of return for the monitoring period compounded daily.[49] Sprint contends it is entitled to interest on the damage amounts

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[41] In the *MCI Liability Order* we stated:

> the defendants filed the rate of return monitoring reports which...were developed by the Commission for several purposes, including making information about carrier earnings public[ly] available. Moreover, the monitoring reports relied on by MCI in its complaints were specifically designated by the Commission as a "final" and conclusively binding determination of a carrier's earnings.

5 FCC Rcd at 225. We note further that, we have held that Section 415(e) is inapplicable to the type of complaints we deal with here. Section 415(e) concerns a carrier's liability to its customers for failure to transmit a message in accordance with its common carrier obligations. The instant complaints deal with the lawfulness of defendants' rates, not defendants' transmissions or obligations to transmit messages properly. *See MCI Reconsideration Order,* 5 FCC Rcd at 3464.

[42] *See MCI Liability Order,* 5 FCC Rcd at 222-23.h

[43] *Id.* at 226.

[44] *Discovery Order,* 7 FCC Rcd at 3585.

[45] *Id.*

[46] *Id.*

[47] This amount includes $119,900 from PNB, $539,000 from MTN, and $293,000 from NWB.

[48] Sprint Br. at 11-12.

[49] *Id.* at 12.

which, through July 1, 1992, totals $889,800 in the case of USWC,[50] $1,441,600 in the case of Pacific Bell, and $87,100 in the case of SNET.

21. The defendants challenge Sprint's damages claims on a number of grounds, raising several arguments that were previously considered and rejected by the Commission in the *MCI Liability Order* and the *MCI Damages Order*. Defendants contend that by simply basing its damages claims on a calculation of Sprint's prorated share of category-level overearnings, Sprint asks the Commission to award it damages in the same amounts it would have received under the automatic refund rule invalidated by the court in *AT&T v. FCC*.[51] The defendants maintain that such a result is expressly precluded by *AT&T v. FCC*. The defendants add that the decision in *Ohio Bell* precludes an award of damages based solely on category level overearnings.

22. Several defendants contend that, even if *AT&T v. FCC* and *Ohio Bell* do not preclude Sprint's damages claims, the claims still fail because Sprint's complaints do not establish a valid cause of action. According to defendants, to pursue a damages claim, Sprint must first show that the defendants charged unjust and unreasonable rates for interstate access services during the period in question, not that defendants' rates produced excessive returns in individual service categories.[52] Moreover, defendants argue, Section 206 of the Act[53] requires Sprint to prove injury, causation, and the amount of damages in addition to establishing a violation of the Act.[54] Defendants maintain that by simply referencing defendants' earned rates of return for individual access service categories, Sprint has not only failed to allege any facts that would establish that defendants' rates were unjust and unreasonable during the period in question but has also failed to show that it sustained actual damage as a result of those rates.[55]

23. The defendants each raise distinct arguments to support their claims that an award of damages to Sprint based on carrier overearnings is inappropriate for equitable and policy reasons. USWC vigorously argues that Sprint is actually seeking restitution or a refund of tariffed charges, not damages. USWC argues that regardless of how Sprint characterizes the relief it seeks, any form of refund or restitution to Sprint would be contrary to the public interest.[56] USWC further contends that an award of damages would be inequitable because (i) USWC's total corporate rate of return would be driven below the confiscatory level; (ii) there was uncertainty surrounding the tariff filings during the relevant period; and (iii) Sprint would receive a windfall that would be inconsistent with sound equitable principles.[57]

24. For its part, Pacific Bell argues that Sprint's claim for damages is flawed because Sprint simply assumes that lower rates would have produced lower earnings and offers no probative evidence to support its damages claims.[58] Pacific Bell argues, as does USWC, that Sprint would receive a windfall if it has passed the "overcharges" on to its customers and is now awarded damages.[59] Pacific Bell argues that had its access charges to Sprint been lower in 1985-1986, it is almost certain that Sprint's rates to its customers would have been lower.[60] Pacific Bell cautions the Commission to look at the "backdrop of the practical consequences" and ensure that any decision granting Sprint "refunds" is equitable under the circumstances.[61] Pacific

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[50] This amount includes $112,100 from PNB, $503,800 from MTN, and $273,900 from NWB.

[51] *See, e.g.*, SNET Br. at 7. In addition, defendants contend that *Ohio Bell* makes clear that it was the end result of the automatic refund mechanism, not the mechanism itself, that was unlawful. Pacific Bell Br. at 7.

[52] USWC argues that Sprint must specify an identifiable rate that Sprint paid that was too high or too low. USWC Br. at 11. In addition, USWC cites to a 1970 circuit court decision to support its claim that where retroactive relief is ordered for rates paid pursuant to a tariff that is subsequently found unjust and unreasonable, the Commission must determine what a just and reasonable rate is. *Id.*, citing to *Middlewest Motor Freight Bureau v. United States*, 433 F.2d 212, 232 (8th Cir. 1970) (*Middlewest*), *cert. denied*, 402 U.S. 999 (1971). As we determined in the *MCI Damages Order*, USWC's reliance on *Middlewest* is misplaced. *MCI Damages Order* at n.56.

[53] 47 U.S.C. § 206.

[54] *See, e.g.*, Pacific Bell Br. at 17.

[55] *See, e.g.*, USWC Br. at 12. USWC contends that the principle that Sprint must still prove it was damaged and in what amount was established by the Supreme Court in *Southern Ry. Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 454-55 (1979) (*Seaboard*), in construing relevant sections of the ICA. The Court stated:

> [O]ur sole concern is the Commission's decision not to investigate under § 15(8)(a) [204], a decision that has only two final consequences. First, the burden of proof with regard to *reasonableness* is placed on the shipper under § 13(1) [208] rather than on the carrier, who would have borne it in a § 15(8)(a) [204] proceeding. (With respect to all other aspects of lawfulness, however, the burden is borne by the shipper in both proceedings.) Second, the shipper's relief, if unlawfulness is proved, is limited under § 13(1) [208] to actual damages rather than the full refund of overcharges available under § 15(8)(a) [204].

USWC states that this ruling has been found applicable to proceedings under the Communications Act. *See Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221, 1235 n.35 (D.C. Cir. 1980) (*ARINC*), *cert. denied*, 451 U.S. 920 (1981). Here too, as we determined in the *MCI Damages Order*, USWC's reliance on case precedent is misplaced. *MCI Damages Order* at n.59.

[56] USWC Br. at 13-19. USWC argues Sprint must plead its case in equity and the Commission may only award a refund/damages if we find that the public interest will be served by a refund/damages award to Sprint. USWC contends that the leading case in this area is *Moss v. Civil Aeronautics Board*, 521 F.2d 298 (D.C. Cir. 1975) (*Moss*), *cert. denied sub nom. Roberts v. Civil Aeronautics Board*, 424 U.S. 966 (1976), *reh'g denied*, 425 U.S. 966 (1976). USWC states that the refund in *Moss* "was governed by the equitable principles governing the law of restitution." USWC Br. at 15, citing to *Moss*, 521 F.2d at 304. We addressed this argument in the *MCI Damages Order* and found USWC's reliance on *Moss* to be misplaced. *MCI Damages Order* at n.60.

[57] USWC Br. at 17-19.

[58] Pacific Bell Br. at 17-18.I

[59] *See, e.g., id.* at 20.

[60] *Id.* at 19. Pacific Bell cites to numerous newspaper and magazine articles to support this contention.

[61] *Id.* at 20 citing to *Las Cruces TV Cable v. FCC*, 645 F.2d 1041 (D.C. Cir. 1981) (*Las Cruces*). In *Las Cruces*, the court upheld, in part, and remanded, in part, a Commission decision requiring refunds under Section 204 of the Act. The court noted that *Las Cruces*

Bell further argues that, should the Commission award damages to Sprint, the Commission should order Sprint to pass the damages through to its end users in the form of a rate reduction.[62]

25. Finally, Pacific Bell argues that any award of damages to Sprint based on overearnings should be reduced by Pacific Bell's underearnings in the common line category (earnings under 12.75%) and an automatic refund in the switched traffic sensitive category which Pacific Bell claims it made in 1988 prior to the court's decision invalidating the automatic refund rule.[63] Taking these factors into consideration, Pacific Bell claims that Sprint has already received a windfall of approximately $1,376,000 from undercharges and amounts already refunded.

26. SNET argues that any award of damages to Sprint based on overearnings in the switched traffic sensitive category would be both confiscatory and inequitable.[64] SNET states that it underearned in two categories and underearned overall for the relevant period. By requiring SNET to pay damages to Sprint, SNET contends that its earnings for the period would be even further depressed. SNET adds that Sprint has not been harmed due to its purchases from SNET but has actually benefited by receiving a windfall of approximately $224,000 in the categories where SNET underearned.[65]

27. Sprint counters that defendants' threshold arguments regarding the effect of the court's ruling in *AT&T v. FCC* have largely been rejected or precluded by the *MCI Liability Order*.[66] Sprint states that the so-called similarities between its damages requests and the automatic refund do not transform the private complaint remedy into a public enforcement refund remedy as alleged by the defendants.[67] Sprint also points out that the Sections 206-209 damages remedies are invulnerable to any challenge based on the decisions in *AT&T v. FCC* and *Ohio Bell*. This, Sprint claims, is underscored by Judge Starr's concurring opinion in *AT&T v. FCC* in which he notes that refunds (under Section 204(a)) and damages (under Sections 206-209) are the two remedies specified in the Act for injured customers.[68]

28. Sprint further argues that equitable considerations are relevant only to the Commission's public enforcement remedies and not to private complaints for damages because the Commission has no discretion in the award of damages under Sections 206-209 of the Act.[69] Sprint claims that defendants' offset arguments should be rejected because the Commission has already held that cross-subsidies in earning categories are not allowed. Sprint adds that, even if taken into account, any equitable considerations in these proceedings weigh in its favor rather than in favor of the defendants.[70]

29. Sprint next argues that its measure of damages is reasonable, being based upon long standing judicial precedent.[71] Sprint states that Pacific Bell's equitable arguments regarding the failure of Sprint to flow-through damages it might recover have been repeatedly rejected by the courts and the Commission.[72] Moreover, Sprint contends, offsets are in the nature of counterclaims and as such, are not within the Commission's jurisdiction because they would involve the determination of a carrier's rights against a customer.[73]

30. Sprint further contends that Pacific Bell should not be given credit for its claimed partial refund of excess switched traffic sensitive charges in 1988.[74] Sprint contends that Pacific Bell revenues from any reduced rates would be reflected in Pacific Bell's earnings reported for the 1987-1988 monitoring period. Since Pacific Bell overearned in this category in 1987-1988, Sprint argues that the rate reduction is meaningless.

b. Discussion

31. *AT&T v. FCC and Ohio Bell:* The defendants' claims that the holdings in *AT&T v. FCC* and *Ohio Bell* control these proceedings and bar an award of damages to Sprint are without merit for the reasons stated in both the *MCI Liability Order* and the *MCI Damages Order*. In the liability section above, we again emphasized that the court in *AT&T v. FCC* explicitly acknowledged the Commission's authority to order a carrier to disgorge earnings in excess of a rate of return prescription,[75] finding only the remedy component of the Commission's rate of return prescription (the automatic refund mechanism) to be unlawful.[76] More to the point, we emphasized that "the [*AT&T v. FCC*] opinion does not address Section 208 complaint proceedings nor purport to alter the statutory scheme of the Act or the remedies Congress established therein."[77] Similarly, as we stated in the *MCI Damages Order*, the *Ohio Bell* de-

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is the first time that the Federal Communications Commission has attempted to articulate standards governing its award of refunds to customers of a communications common carrier under Section 204 of the Act.

645 F.2d at 1046. Pacific Bell's reliance on *Las Cruces* is unavailing, however, because equitable considerations that may impact a Section 204 investigation are not applicable in individual Section 208 complaint proceedings.

62 Pacific Bell Br. at 20-21.

63 Pacific Bell RBr. at 13.

64 SNET Br. at 8.

65 *Id.* at 10.

66 Sprint RBr. at 4.

67 *Id.* at 6-7.

68 *See AT&T v. FCC*, 836 F.2d at 1393-94.

69 Sprint RBr. at 14.

70 *Id.* at 15-16.

71 *Id.* at 18.

72 *Id.* at 19. Sprint specifically argues that the Commission's decision in Hughes Sport Network, Inc., 34 FCC 2d 691, *recon. denied*, 38 FCC 2d 1052 (1972) along with the Supreme Court's decisions in *Southern Pacific v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531 (1918) and *Hanover Shoe Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968) require that the "passing-on" defense be rejected.

73 Sprint RBr. at 21, citingto Thornell Barnes Co. v. Illinois Bell Telephone Co., 1 FCC Rcd 1247, 1275 (1965) (*Thornell Barnes*) ; Laning-Harris Coal & Grain Co. v. St. Louis & San Francisco R. Co., 15 ICC 37,38 (1909); Breece Veneer Co. v. C&O Railroad Co., 182 ICC 690 (1932); and Illinois Bell v. AT&T, 4 FCC Rcd 5268 (1989) (*Illinois Bell II*), *recon. denied*, 4 FCC Rcd 7759 (1989).

74 Sprint RBr. at 22, n.14.

75 *AT&T v. FCC*, 836 F.2d at 1392 ("Thus, as we previously have concluded, the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate of return prescription.").

76 Indeed, the court in *Ohio Bell* recognized the continuing efficacy of our rate of return framework. *See* 949 F.2d at 868.

77 *MCI Liability Order*, 5 FCC Rcd at 223.

cision does not expand upon *AT&T v. FCC* and does not address the Commission's authority to award damages in private complaint actions under Section 208 of the Act.[78]

32. *Section 201(b) of the Act:* We turn now to the defendants' contention that Sprint's damages claims must be dismissed because Sprint has failed to prove defendants' rates were unjust and unreasonable within the meaning of Section 201(b) of the Act. In the liability section above, we held that the complainant met its burden of proof by establishing that the defendants violated our rate of return prescription.[79] Accordingly, the question before us now is not whether defendants' rates were unjust and unreasonable; rather the questions now are whether the complainant suffered any measurable damage as a consequence of paying rates previously determined by the Commission to be unlawful under Section 201(b).

33. The defendants next claim, that even if Sprint has sustained its burden and shown that defendants' rates were unjust and unreasonable, its damages claims must still fail because judicial precedent compels Sprint to establish what a just and reasonable rate would have been as a prerequisite to pursuing damages claims based on unreasonable rates,[80] has previously been discussed and rejected by the Commission. In the *MCI Damages Order* we reemphasized[81] the Commission's authority to prescribe and enforce carriers' rates of return, pointed out that the issue in these proceedings is not whether individual rates are unlawful, but whether cumulative rates that produced earnings over and above a prescribed rate of return are unjust and unreasonable, and agreed with the Bureau's determination in the *Discovery Order* that a proper starting point for assessing damages based on violations of a rate of return prescription is to look at the difference between the amount complainant paid for defendants' interstate access services and the amount it would have paid if defendants had charged rates that produced returns within the Commission's prescribed levels.[82] We said, "[i]t is appropriate and consistent with the Commission's rate of return regulatory scheme to inquire as to earnings in excess of prescribed levels for purposes of assessing damages claims."[83] Sprint has shown that it purchased services from defendants at rates that produced earnings over and above the defendants' prescribed levels. We previously determined in the *MCI Liability Order* that a violation of such a prescription constitutes a violation of the Act for which damages may lie.

34. *Damages and Offsets:* The defendants' arguments are devoted primarily to attempting to persuade the Commission that Sprint's damages claims are really claims for restitution or refunds governed by equitable or public policy considerations. These considerations, according to defendants, militate against any award of damages to Sprint based on excessive earnings. The defendants argue, in effect, that the damages Sprint seeks are equivalent to refunds that would have been required under the refund mechanism invalidated by the court in *AT&T v. FCC*. We do not agree. We are concerned here with determining whether a particular customer, which has availed itself of a statutory complaint remedy under Title II of the Act, has sustained any measurable damage that can be traced to defendants' violations of the Act. Although a damages award under Section 208 of the Act might well be equal or substantially similar to a refund ordered under Section 204 of the Act,[84] this does not transform a private complaint action into a public enforcement proceeding subject to broad public interest considerations.

35. As in the *MCI Damages Order*, we find defendants' arguments with respect to "passing-on" equally unavailing. In rejecting this same argument, we said, "[w]hether [complainant] passed on the overcharges or absorbed them does not alter the fact that the defendants overcharged [complainant] in violation of a binding rate of return prescription and must answer for such violations."[85] The issue is not what Sprint has done in response to paying excessive rates, but whether Sprint has been damaged as a result of these excessive rates.[86]

36. Nor can we accept the defendants' related claim that we should require Sprint to flow through any damages it may receive to its end user customers. Sections 206-209 of the Act give private parties the right to file complaints challenging the acts or omissions of carriers and to recover monetary damages resulting from such acts or omissions. Complainants, however, are charged, as Sprint is in the instant case, with the burden of establishing violations of the Act or Commission rule or order and the amount or extent of damage suffered as a consequence of such violations. Accepting defendants' flow through argument would, in effect, transform Sprint's complaints into class action suits on behalf of its customers, a result neither expressly contemplated by nor consistent with the private remedy created under Sections 206-209 of the Act.

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[78] *MCI Damages Order* at para. 26.

[79] In the *MCI Liability Order*, we held that the complainant therein could prove that defendants' rates were unjust and unreasonable by proving that the defendants violated our rate of return prescription. *See MCI Liability Order*, 5 FCC Rcd at 226.

[80] USWC Br. at 10, citing *Middlewest*, 433 F.2d at 232.

[81] For a full discussion of the Commission's authority to prescribe and enforce carriers' rates of return, *see MCI Liability Order*, 5 FCC Rcd at 222-23.

[82] *MCI Damages Order* at para. 29.

[83] *Id.*

[84] *See Seaboard*, 442 U.S. 444, 455, n.8:

> If a shipper proves a rate is unreasonable and that he was damaged in the full amount he was overcharged, the outcome of a § 13(1) [§ 208] proceeding will be no different than that of a § 15(8)(a) [§ 204] proceeding in which the carrier fails to establish the reasonableness of the rate.

[85] *MCI Damages Order* at para. 31.

[86] While defendants have asserted that lower charges to complainant would have resulted in lower charges to complainant's customers, they have provided no persuasive evidence in support of this contention. Pacific Bell, for example, relies solely on press clippings that purportedly show that Sprint's rates to its customers would have been affected by changes in defendants' rates. Pacific Bell Br. at 19-20. These clippings do not, however, establish, as a matter of law, that complainant, in fact, passed on defendants' overcharges to its customers.

37. In addition, we reject USWC's contention that a damages award to Sprint is precluded because it would drive USWC's overall rate of return for USWC in the aggregate below the minimum necessary to raise capital to confiscatory levels. Assuming *arguendo*, that such an inquiry is relevant to a Section 208 damages claim, USWC has failed to provide sufficient record evidence for the Commission to assess the impact of any damages award upon its overall interstate rate of return. While USWC has provided some data in Exhibit A to its brief,[87] these data made no clear showing of the amount by which an award to Sprint would reduce USWC's overall interstate earnings or rate of return let alone that any such reduction would be confiscatory. For the reasons stated in the *MCI Damages Order*,[88] we find USWC's other equitable arguments regarding the uncertainty surrounding tariff filings during the 1985-86 period and an alleged windfall to Sprint should it receive restitution equally unavailing.

38. We also reject Sprint's claim that the Commission has no jurisdiction to allow defendants to offset damage claims because it would, in effect, be a determination of a carrier's rights against a customer. As we discussed in the *MCI Damages Order*, Sprint's reliance on *Thornell Barnes* and *Illinois Bell II* for this proposition is misplaced.[89] In the instant case, we are dealing with an issue fundamentally different from that presented in either *Thornell Barnes* or *Illinois Bell II*. The issue presented by Sprint and contested by defendants is the extent to which Sprint incurred any actual damages as a consequence of defendants' violations of a binding rate of return prescription. The focus of Sprint's complaints is not defendants' individual interstate access rates *per se*, but the excessive earnings produced by these rates and their effect on Sprint. We believe that it is reasonable to inquire into Sprint's overall purchase of interstate access services from defendants during the period in question for purposes of measuring Sprint's damages that are attributable to defendants' violations of the rate of return prescription.

39. Sprint's contention that past decisions regarding cross-subsidization of services prohibits the allowance of offsets is similarly unpersuasive. As a measure of damages, Sprint asks only that we compute the difference between what it paid for defendants' interstate access services and what it would have paid if defendants' rates had produced earnings within the Commission's prescribed levels. Sprint does not allege that defendants' rates should have been set at a specific amount, nor does it claim that such a showing is necessary for purposes of its damages claims. In this context, where the focus is on earnings levels, not individual rates, we believe it entirely reasonable to examine the sum of Sprint's purchases of interstate access services for purposes of assessing its damages claims.

40. USWC raises factors which it believes warrant an offset against Sprint's damages claims. USWC claims that it underearned in the switched traffic sensitive category in four states and in the special access category for one state. In addition, USWC states that Sprint's base damage calculations are overstated for several other reasons. First, USWC contends that Sprint failed to include all relevant elements in MTN's rate base, thus overstating Sprint's base damage award. USWC also claims that Sprint used the incorrect tax rate in "grossing up" USWC's alleged overearnings. After adjusting the rate base, using the correct tax rate and allowing for offsets of underearnings, USWC states that Sprint's base damage award should be reduced by $505,100.

41. Pacific Bell also provides specific calculations for offsets in its reply brief. Pacific Bell states that it underearned on its common line services during the period in question and that Sprint's prorated share of those underearnings is approximately $855,000. In addition, Pacific Bell states that it has previously refunded approximately $621,000 to Sprint in 1988 for switched traffic sensitive services overearnings. Pacific Bell argues that taking into account its underearnings and the previously refunded amounts, a net overcharge to Sprint of approximately $66,000 results.

42. In addition, SNET submitted calculations claiming offsets of $132,000 for underearnings in both the common line and special access categories. SNET contends that no damages should be awarded to Sprint when these offsets are taken into account.

43. We have carefully reviewed the arguments and evidence presented by the parties and believe that some offset to the claimed damages amounts is appropriate. In the *MCI Liability Order*, we specifically rejected claims by the defendants that the Commission is required to take a carrier's interstate access underearnings as well as overearnings into account in determining whether a violation of the Act has occurred because this would be at odds with established case law.[90] However, we stated in the$Z*MCI Damages Order* that it is appropriate to consider defendants' underearnings in assessing complainant's damage or injury resulting from defendant's overearnings in a particular monitoring period[91] and rejected the complainant's contention that this approach results in unlawful cross-subsidization.[92] The parties have made no argument which persuades us to alter our holdings.

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[87] Exhibit A contains a summary and compilation of information submitted in PNB's, MTN's, and NWB's Forms 492 for the relevant monitoring period, a calculation of how much money USWC would have earned if its entire carrier enterprise earned exactly at a 12.75% rate of return, and the same calculation at a 13.10% rate of return.

[88] *MCI Damages Order* at para. 32.

[89] *Id.* at para. 33.

[90] *MCI Liability Order*, 5 FCC Rcd at 223, citing *Nader v. FCC*, 520 F.2d 182, 201 (D.C. Cir. 1975). *See also New England Tel. & Tel. Co. v. FCC*, 826 F.2d 1101 (D.C. Cir. 1987), *cert denied*, 109 S. Ct. 1942 (1989); and *AT&T v. FCC*.

[91] *MCI Damages Order* at para. 38.

[92] *Id.* at para. 39.

44. Based upon our decision regarding the computation of damages here, we will not award damages to Sprint from PNB.[93] The application of offsets by PNB to the amounts claimed as damages by Sprint reduces those amounts to zero.[94]

45. We award damages to Sprint from MTN in the amount of $528,059. In reaching this amount, we are not allowing MTN an offset for underearnings in Colorado because MTN recalculated its rate of return in the switched traffic sensitive category using disallowed items[95] and then calculated the offset using the category target rate of return plus buffer of 13.25% rather than the 12.75% target. When these errors are corrected, MTN did not underearn in Colorado.[96]

46. We award damages to Sprint from NWB in the amount of $246,972.[97] In reaching this amount, we allowed NWB an offset of $45,247 for underearnings in South Dakota in both switched traffic sensitive and special access categories.[98]

47. We award damages to Sprint from Pacific Bell in the amount of $66,200.[99] In reaching this amount, we have allowed the offset of undercharges in the common line category in the amount of $855,000 and the refund of switched traffic sensitive charges for the 1986-1986 monitoring period of $621,000 that was effected by Pacific Bell in 1988 pursuant to the later-invalidated automatic refund rule. Pacific Bell has made a showing, and Sprint has not convinced us otherwise, that Sprint recouped a portion of the excessive switched traffic sensitive charges in the form of the rate reduction effected by Pacific Bell in 1988 pursuant to the later-invalidated automatic refund rule.

48. Consistent with our decision regarding the computation of damages, we will not award damages to Sprint from SNET. The application of offsets by SNET to the amounts claimed as damages by Sprint reduces those amounts to zero.[100]

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[93] This determination is based on the following:

$	118,562	(overcharges - switched traffic sensitive in Oregon)
-	5,656	(undercharges - common line category in Idaho)
-	120,904	(undercharges - common line category in Washington)
$	0	Damages

[94] We note that USWC disputes Sprint's base damage figure for PNB, MTN, and NWB because Sprint used marginal rather than effective tax rates in calculating its claims. We agree with USWC that the effective tax rates are the proper rates to use. The effective tax rates reflect the taxes defendants actually paid. The use of marginal tax rates would overstate pre-tax revenues and thus overstate the amount of Sprint's damages. We also note that USWC calculated offsets for category underearnings at 13.25%. USWC should have used the authorized target rate of 12.75%. A carrier cannot be said to have underearned to the extent that its earnings exceeded the target rate of return. Therefore, USWC's offset calculations are in error to the extent it calculated underearnings in particular categories using the category target rate of return plus buffer. We recalculated PNB's offsets to allow only for underearnings below the authorized targeted rate of return of 12.75%. We also adjusted Sprint's base damages claim by using the effective tax rates provided by USWC.

[95] We reject MTN's argument that the Information and Intercept element should be included in the calculation of MTN's rate of return for the switched traffic sensitive category. These items were not included by state on MTN's Form 492 and we will not allow adjustments to be made to those reported figures. As we discussed in the *MCI Liability Order*, the Form 492 is a final report and carriers may rely upon it. *See MCI Liability Order*, 5 FCC Rcd at 225, para. 78. We do agree with MTN, however, that effective rather than marginal tax rates should be used in "grossing-up" overearnings. *See supra* note 94. We have corrected the calculations to account for adjustments.

[96] MTN earned $38,996,000 in the switched traffic sensitive category in Colorado. Using the target category rate of return of 12.75%, MTN was allowed earnings of $37,701,113. MTN cannot be said to have underearned to the extent that its earnings exceeded the target earnings level.

[97] This amount is calculated as follows:

$	292,219	(overcharges)
-	21,394	(undercharges - special access category in S. Dakota)
-	23,853	(undercharges - switched traffic category in S. Dakota)
$	246,972	Damages

[98] We note that we recalculated NWB's offsets to allow only for underearnings below the authorized target of 12.75% rather than the 13.25% used by defendant. We have also adjusted Sprint's base damage figure by using the effective tax rates supplied by USWC. *See supra* note 94.

[99] This amount is calculated as follows:

$	1,542,200	(overcharges)
-	855,000	(undercharges - common line category)
-	621,000	(amount refunded by Pacific Bell)
$	66,200	Damages

[100] This determination is based on the following:

$	93,100	(overcharges)
-	62,000	(undercharges - common line category)
-	162,000	(undercharges - special access category)
$	0	Damages

2. Interest on Damages Awards

a. Contentions of the Parties

49. Defendants' final claim is that Sprint is not entitled to prejudgment interest should the Commission award damages to Sprint. Pacific Bell grounds its claim on its contention that the amount of damages has been sharply disputed in these proceedings.[101] Pacific Bell claims that interest would penalize it even though it has not been accused of deliberate wrongdoing and interest is not necessary to make Sprint whole. USWC simply contends that while the Commission may award interest under Section 204 of the Act, there is no provision for the award of interest under Section 206 of the Act. Because we cannot lawfully grant Sprint a refund, USWC argues, we may not award interest.[102]

50. Sprint disputes defendants' claims that it is not entitled to prejudgment interest in connection with any ultimate damages award. Sprint contends that an award of prejudgment interest is appropriate in the instant case because defendants could ascertain with sufficient certainly the amount of Sprint's damages. Sprint also argues that an award of interest is required by considerations of fairness and sound regulatory policy.[103] Sprint contends it is entitled to interest at the authorized rate of return of 12.75% from January 1, 1987 through July 1, 1992 of $889,800 from USWC, $1,441,600 from Pacific Bell and $87,100 from SNET.[104]

b. Discussion

51. Defendants' claim that the Commission lacks the requisite authority to award interest in a Section 208 common carrier complaint proceeding has no merit. Although an award of interest does not fall squarely within the ambit of Section 208 of the Communications Act, our authority under Sections 4(i) and other sections of the Act to award interest in a common carrier complaint case is well established.[105] In deciding whether to award interest in a particular common carrier complaint case we are generally guided by federal court practice, where the award of prejudgment interest "... is a matter left to the sound discretion of the trial court."[106] The award of interest in a common carrier complaint case is thus guided by considerations of fairness. Applying this standard, we are persuaded that an award of interest is appropriate in this case. Sprint was effectively deprived of the use of the excessive amounts it paid defendants as a result of defendants' unlawful rates while defendants, on the other hand, enjoyed the beneficial use for a substantial period of time of funds to which Sprint rightfully has a claim. We are persuaded that interest is required not only to effect a full and fair remedy for Sprint, which paid rates higher than it would have paid had defendant earned within the prescribed level, but also to avoid any unjust enrichment of defendant stemming from its charging rates that we have determined to be unjust and unreasonable under Section 201(b) of the Act.[107] Sprint is wrong, however, in claiming that an award of interest necessarily flows from our decisions in the CC Docket No. 84-800 proceedings and, therefore, should be computed at the rate specified in those proceedings.[108] Just as the courts' decisions regarding the validity of the rate of return mechanism and refunds under Section 204 of the Act do not guide us in this Section 208 proceeding, we are similarly not bound by interest rate computations prescribed in CC Docket No. 84-800. We conclude that interest should be computed at the IRS rate for tax refunds, not at the rate Sprint requests.[109] In addition, we find that interest should begin to accrue from January 1, 1987, the day after which the 1985-1986 monitoring period ended. At that point, defendants were subject to the earnings limitations of a new monitoring period. Accordingly, we award interest calculated at the IRS rate for tax refunds[110] from MTN, NWB, and Pacific Bell to Sprint from January 1, 1987 until the date of full payment to Sprint.

IV. CONCLUSION

52. We have carefully reviewed the extensive record before us and have found, to the extent indicated here, that complainant is entitled to an award of damages, plus accumulated interest on such damages, for Mountain States Telephone and Telegraph Company's, Northwestern Bell Telephone Company's, and Pacific Bell Telephone Company's violations of our rate of return prescription for the 1985-1986 monitoring period.

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101 Pacific Bell Br. at 24.

102 USWC Br. at 13.

103 *See* Sprint Br. at 10-11.

104 *Id.* at 12.

105 *See* MCI Telecommunications Corporation v. American Telephone and Telegraph Company, *et al.*, 94 FCC 2d 332, 343-46 (1983).

106 *United States v. California Board of Equalization*, 650 F.2d 1127, 1132 (9th Cir. 1981), *aff'd*, 456 U.S. 901 (1982), *reh'g denied*, 456 U.S. 985 (1982).

107 *See New England Telephone and Telegraph Co. v. FCC*, 826 F.2d 1101, 1113 (D.C. Cir. 1987), *cert. denied*, 109 S. Ct. 1942 (1989) (carriers may reasonably be required "to pay full interest for earnings they had no right to retain in the first place.").

108 *See* Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985) (*Phase I Order*), *on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,033 (Apr. 1, 1986) (*Phase I Reconsideration*), *on further reconsideration*, 2 FCC Rcd 190 (1987).

109 We believe that the rationale adopted by the Commission for applying the IRS rate in pole attachment complaint proceedings under Section 204 of the Act, 47 U.S.C. § 204, is equally applicable here. In Teleprompter of Fairmont v. C&P of West Virginia, 79 FCC 2d 232 (1980), the Commission stated

> As a matter of fairness, we believe that the rate of interest applied in a pole attachment complaint proceeding should be readily available, easily applied, and periodically revised to reflect changes in borrowing costs. In light of these considerations, we find the interest rate for federal tax refunds and additional tax payments suitable for use in this type of proceeding. This rate appears in a variety of easily obtained official and commercial publications, and is revised on a regular basis. [Footnote omitted.]

110 The applicable IRS rates are set forth in Appendix A.

V. ORDERING CLAUSES

53. Accordingly, IT IS ORDERED, pursuant to Section 4(i), 4(j), 201, 206, 207, 208 and 209 of the Communications Act, as amended, 47 U.S.C. §§ 4(i), 4(j), 201, 206, 207, 208 and 209, that the above-captioned complaints filed by US Sprint Communications Limited Partnership ARE GRANTED to the extent discussed here.

54. IT IS FURTHER ORDERED that Mountain States Telephone and Telegraph Company SHALL PAY to US Sprint Communications Limited Partnership the sum of $528,059 (five hundred twenty-eight thousand fifty-nine dollars) together with interest within 60 days after the release date of the Memorandum Opinion and Order; that Northwestern Bell Telephone Company SHALL PAY to US Sprint Communications Limited Partnership the sum of $246,972 (two hundred forty-six thousand nine hundred seventy-two dollars) together with interest within 60 days after release date of this Memorandum Opinion and Order; and that Pacific Bell Telephone Company SHALL PAY to US Sprint Communications Limited Partnership the sum of $66,200 (sixty-six thousand two hundred dollars) together with interest within 60 days after release date of this Memorandum Opinion and Order.

55. IT IS FURTHER ORDERED that Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company and Pacific Bell Telephone Company SHALL PAY to US Sprint Communications Limited Partnership interest on the damages awarded here computed at the IRS rates set forth in Appendix A from January 1, 1987 until the date full payment is made.

56. IT IS FURTHER ORDERED that the Supplement to Motion to Dismiss filed by Pacific Northwest Bell Telephone Company, Mountain States Telephone and Telegraph Company and Northwestern Bell Telephone Company on February 13, 1992 IS ACCEPTED for filing.

57. IT IS FURTHER ORDERED that the Motion to Dismiss filed by Southern New England Telephone Company IS DISMISSED; and that the Motion to Dismiss filed by Pacific Northwest Bell Telephone, Mountain States Telephone and Telegraph Company, and Northwestern Bell Telephone Company IS DISMISSED.

58. IT IS FURTHER ORDERED that the Contingent Cross Complaint filed by Pacific Northwest Bell Telephone, Mountain States Telephone and Telegraph Company, and Northwestern Bell Telephone Company IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Effective Period	Rate	Internal Revenue Service Citation
01/01/87 - 03/31/87	8%	Rev.Rul. 146, 1986-2 C.B. 208
04/01/87 - 06/30/87	8%	Rev.Rul. 87-23, 1987-13 I.R.B. 46
07/01/87 - 09/30/87	8%	Rev.Rul. 87-62, 1987-29 I.R.B. 10
10/01/87 - 12/31/87	9%	Rev.Rul. 87-87, 1987-36 I.R.B. 8
01/01/88 - 03/31/88	10%	Rev.Rul. 87-131, 1987-50 I.R.B. 6
04/01/88 - 06/30/88	9%	Rev.Rul. 88-17, 1988-10 I.R.B. 6
07/01/88 - 09/30/88	9%	Rev.Rul. 88-50, 1988-25 I.R.B. 39
10/01/88 - 12/31/88	10%	Rev.Rul. 88-86, 1988-41 I.R.B. 1
01/01/89 - 03/31/89	10%	Rev.Rul. 88-105, 1988-51 I.R.B. 4
04/01/89 - 06/30/89	11%	Rev.Rul. 89-36, 1989-1 C.B. 309
07/01/89 - 09/30/89	11%	Rev.Rul. 89-69, 1989-1 C.B. 310
10/01/89 - 12/31/89	10%	Rev.Rul. 89-99, 1989-2 C.B. 256
01/01/90 - 03/31/90	10%	Rev.Rul. 89-125, 1989-2 C.B. 257
04/01/90 - 06/30/90	10%	Rev.Rul. 90-19, 1990-1 C.B. 186
07/01/90 - 09/30/90	10%	Rev.Rul. 90-47, 1990-1 C.B. 187
10/01/90 - 12/31/90	10%	Rev.Rul. 90-71, 1990-35 I.R.B. 4
01/01/91 - 03/31/91	10%	Rev.Rul. 90-94, 1990-46 I.R.B. 16
04/01/91 - 06/30/91	9%	Rev.Rul. 91-20, 1991-11 I.R.B. 1
07/01/91 - 09/30/91	9%	Rev.Rul. 91-33, 1991-21 I.R.B. 1
10/01/91 - 12/31/91	9%	Rev.Rul. 91-50, 1991-37 I.R.B. 1
01/01/92 - 03/31/92	8%	Rev.Rul. 91-65, 1991-51 I.R.B. 1
04/01/92 - 06/30/92	7%	Rev.Rul. 92-21, 1992-14 I.R.B. 14
07/01/92 - 09/30/92	7%	Rev.Rul. 92-44, 1992-24 I.R.B. 86
10/01/92 - 12/31/92	6%	Rev.Rul. 92-77, 1992-38 I.R.B. 12

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NATIONAL TELEPHONE SERVICES, INC.,
Complainant,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY,	File No. E-91-57
SOUTHERN BELL TELEPHONE COMPANY,	File No. E-91-58
SOUTH CENTRAL BELL TELEPHONE COMPANY,	File No. E-91-59
PACIFIC BELL,	File No. E-91-60
NEW ENGLAND TELEPHONE COMPANY, and	File No. E-91-61
NEW YORK TELEPHONE COMPANY,	File No. E-91-62

Defendants.

MEMORANDUM OPINION AND ORDER

Adopted: February 2, 1993; Released: March 3, 1993

By the Commission:

TABLE OF CONTENTS

Topic	Paragraph No.
I. INTRODUCTION	1
II. BACKGROUND	2 - 6
III. DISCUSSION	6 - 38
A. Liability for Damages	7 - 16
1. Contentions of the Parties	7 - 11
2. Discussion	12 - 16
B. Damages and Interest Claims	17 - 38
1. Damages	18 - 35
a. Contentions of the Parties	18 - 25
b. Discussion	26 - 35
2. Interest on Damages	36 - 38
a. Contentions of the Parties	36 - 37
b. Discussion	38
IV. CONCLUSION	39
V. ORDERING CLAUSES	40 - 43

I. INTRODUCTION

1. In this Memorandum Opinion and Order we find that the complainant in these consolidated Section 208 proceedings,[1] National Telephone Services, Inc. (NTS),[2] has met its burden of establishing that the defendant local exchange carriers (LECs) have violated Section 201(b) of the Communications Act by earning in excess of the rate of return for interstate access services prescribed by the Commission for the period January 1, 1987 through December 31, 1988. In addition, we award NTS damages and interest from certain of the defendants in the amounts specified below.

II. BACKGROUND

2. The case presented by the complainant is virtually identical to that presented by the complainant in *MCI Telecommunication Corporation v. Pacific Northwest Bell Telephone Co.*[3] In that proceeding, we held that LEC rates that produced earnings in excess of a Commission prescription were unjust and unreasonable within the meaning of Section 201(b) of the Communications Act (the "Act").[4] We also held that a complainant/customer is entitled to recover damages to the extent that it can show that it suffered actual damage as a consequence of such violations. Subsequently, in the damages phase of the proceeding, we held that MCI had properly shown that it had been harmed by paying the defendants' rates that produced the excessive earnings. We awarded the complainant monetary damages, plus interest computed at the IRS rate.[5]

3. A detailed accounting of the Commission's rate of return regulatory scheme as well as relevant Commission and court decisions is set forth in the *MCI Liability Order*

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[1] NTS filed separate complaints against the named defendants. Due to the similarity of the issues and arguments raised by the parties, however, the proceedings have been consolidated for disposition.

[2] NTS was purchased by Telesphere Network, Inc. (Telesphere) subsequent to the filing of the instant complaints. Telesphere is currently a debtor in bankruptcy before the United States Bankruptcy Court for the Northern District of Illinois. NTS is an asset of Telesphere's estate in bankruptcy. *See, e.g.*, National Telephone Services, Inc. v. Bell Telephone Company of Pennsylvania, *et al.*, 7 FCC Rcd 5190 (Com.Car.Bur. 1992). For convenience, we will continue to use the initials "NTS" to refer to complainant throughout this proceeding.

[3] MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co., *et al.*, 5 FCC Rcd 216 (1990) (*MCI Liability Order*) , *recon. denied*, 5 FCC Rcd 3463 (1990) (*MCI Reconsideration Order*) (jointly "*MCI Orders*"), *appeal dismissed sub nom. Mountain States Tel. and Tel. Co., et al. v. FCC*, 951 F.2d 1259 (10th Cir. 1991) (per curiam). *See also*, American Telephone and Telegraph Co. v. Northwestern Bell Telephone Co., 5 FCC Rcd 143 (1990) (*AT&T Liability Order*), *appeal dismissed sub nom. Mountain States Tel. & Tel. Co., et al. v. FCC*, 951 F.2d 1259 (10th Cir. 1991) (per curiam).

[4] Section 201(b), 47 U.S.C. § 201(b), provides that "[a]ll charges, practices, classifications, and regulations for and in connection with ... communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful."

[5] MCI Telecommunications Corporation v. Pacific Bell Telephone Company, FCC 93-70 (released February 8, 1993) (*MCI Damages Order*). *See also* AT&T Communications v. Pacific Northwest Bell Telephone Company, FCC 93-69 (released February 8, 1993) (*AT&T Damages Order*).

and the *MCI Damages Order*[6] and will not be repeated at length here. However, a brief discussion of the development and implementation of the Commission's rate of return prescription is helpful to our analysis of the instant complaints.

4. Following the divestiture of the former Bell system and the concurrent development of the access charge system,[7] the Commission prescribed a rate of return system for all eight entities that emerged after divestiture (i.e., AT&T and the seven Regional Bell Holding Companies) and approximately 1400 other local exchange carriers as well. In a broad rulemaking proceeding, the Commission adopted: (1) methodologies to be used to prescribe maximum rates of return; (2) procedures for represcribing rates of return on a regular basis; (3) a system of monitoring carriers' earnings; and (4) a requirement that overearnings be refunded, either directly to those who had paid rates that produced the overearnings, or pursuant to automatic, prospective adjustments to tariff rates.[8] For the 2-year time period at issue in the instant complaints, January 1, 1987 through December 31, 1988, local exchange carriers, including the defendants, were required to file rates calculated to earn a 12 percent rate of return for overall interstate access.[9] In accordance with the Commission's "buffer" policy, carriers were given notice that 12.25 percent would be the maximum allowable rate of return on overall interstate earnings and that 12.40 percent would be the maximum allowable rate of return for any access service category.[10] The buffer[11] would be used to determine whether the prescription had been violated.[12]

5. In January 1988, the U.S. Court of Appeals for the District of Columbia Circuit set aside the automatic refund mechanism as arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce.[13] The Court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate of return prescription."[14]

6. In February 1988, MCI filed formal complaints against a number of local exchange carriers, including the defendants in the instant proceedings, alleging violations of the Commission's rate of return prescription for the October 1, 1985 through December 31, 1986 monitoring period and requesting monetary damages. In or around September 1989, numerous similar complaints were filed by other interstate access customers alleging rate of return prescription violations for the initial 15-month monitoring period.[15] In January 1990, the Commission released its *MCI Liability Order* granting MCI's complaints anddirecting MCI to file supplemental complaints for damages. In September 1990, NTS filed the above-captioned complaints alleging violations of the Commission's prescription for the second monitoring period, January 1, 1887 through December 31, 1988. In January 1991, the Commission placed all pending rate of return complaints, including MCI's supplemental complaints for damages, in abeyance pending resolution of a related court remand in *Illinois Bell Tel. Co. v. FCC*.[16] Following the return of the proceedings to active status in December 1991 and the completion of discovery,[17] the parties to the various proceedings were required to submit initial briefs and reply briefs setting forth their respective claims and arguments.[18]

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[6] *MCI Liability Order*, 5 FCC Rcd at 217-218.

[7] The Commission has prescribed for all local exchange carriers, including the defendants, a methodology known as the "access charge system," which carriers are required to follow in tariffing their interstate services. The system determines, inter alia, the carriers' overall rate structure and the allocation of costs within that structure, and was in effect during the period covered by the complaints. The access charge system is codified in Part 69 of the Commission's rules. *See* 47 C.F.R. § 69.1 *et seq.* (1988). These rules were developed in a proceeding that was the subject of numerous challenges on appeal. With a few exceptions not relevant to the instant complaint proceedings, these appeals were denied by the D.C. Circuit. *See NARUC v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), cert. denied, 469 U.S. 1227 (1985).

[8] *See* Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Carriers, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41350 (Oct. 10, 1985), (Phase I Order), *on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,103 (Apr. 1, 1986) (Phase I Reconsideration); *on further reconsideration*, 2 FCC Rcd 190 (1987). *See also*, Procedures and Methodologies to Establish Reporting Requirements, CC Docket No. 86-127, FCC 86-514 (released Dec. 3, 1986), 52 Fed. Reg. 273 (Jan. 5, 1987).

[9] *See* Authorized Rate of Return for the Interstate Access Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase III, FCC 86-354, 51 Fed. Reg. 32,920 (Sept. 17, 1986) (*Phase III Order*), *recon. denied*, 2 FCC Rcd 5636 (1987).

[10] 47 C.F.R. § 65.700.

[11] *See MCI Liability Order*, 5 FCC Rcd at 217:

> ... the Commission established both an authorized rate of return and a 'spread' or 'buffer' above that return for use in proceedings relating to the enforcement of the prescription. In other words, the authorized return would be employed in computing tariff rates; the spread, or buffer, would be used in combination with the authorized return to determine whether a rate of return prescription had been violated.' [footnote omitted.]:

[12] *See Phase I Order*, 50 Fed. Reg. at 41,352 (para. 21).

[13] *American Telephone & Telegraph Co. v. FCC*, 836 F.2d 1386, 1390 (D.C. Cir. 1988) (*AT&T v. FCC*). For a detailed discussion of *AT&T v. FCC*, see *MCI Liability Order*, 5 FCC Rcd at 221-223.

[14] *AT&T v. FCC*, 836 F.2d at 1392.

[15] These additional complaints are being dealt with in separate Section 208 complaint proceedings.

[16] 911 F.2d 776 (D.C. Cir. 1990). The Commission acted on the remand in October 1991. *See* Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, CC Docket No. 86-497, 7 FCC Rcd 296 (1991), *appeal docketed sub nom. Illinois Bell Telephone Co., et al. v. FCC*, No. 90-1020 (D.C. Cir. Jan.11, 1991).

[17] *See* National Telephone Services, Inc., v. Bell Telephone Company of Pennsylvania, *et al.*, 7 FCC Rcd 3959 (Com.Car.Bur.1992) (*Discovery Order*).

[18] In the instant proceedings, the complainant and the defendants all filed initial briefs pursuant to the schedules established by the Bureau on September 30, 1992. Each of the defendants also filed a reply to NTS' brief; however, for reasons neither stated by NTS nor apparent from the record, NTS did not file a reply or otherwise respond to any of the defendants' initial briefs.

III. DISCUSSION

A. Liability For Damages

1. Contentions of the Parties

7. NTS alleges that the rates it paid for certain of the defendants' interstate access services during the period from January 1, 1987 through December 31, 1988 were unjust and unreasonable in violation of Section 201(b) of the Act.[19] NTS supports its allegations with evidence taken from reports filed with the Commission by the defendants for the 2-year period atissue that show that defendants achieved earnings in excess of the Commission's prescribed rate of return in one or more of the three interstate access categories established for the purpose of enforcing that rate of return prescription.[20]

8. NTS requests that the Commission declare that the defendant LECs' charges for the period from January 1, 1987 through December 31, 1988 are in violation of the rate of return prescription and Section 201(b) of the Act, and order the defendant LECs to pay damages to NTS equal to the difference between the amount actually paid by NTS for interstate access service during the period and the amount that NTS would have paid if the defendants' charges earned no more than the maximum allowable rate of return, plus interest.

9. Defendants advance a number of arguments to support their claim that NTS has failed to state a cause of action under the Act, most of which were fully considered and disposed of in the *MCI Liability Order* and the *MCI Damages Order*.[21] The defendants make the threshold claim that earnings in excess of a rate of return prescription do not violate the Act or any valid Commission rule or order; and that even if such action could behconsidered a violation, it could occur only if the return was exceeded on an overall, not category, basis.[22] To support this argument, the defendants rely principally upon the D.C. Circuit's decision in *AT&T v. FCC* and a later decision by the Sixth Circuit in *Ohio Bell Tel. Co. v. FCC*[23] Bell Atlantic contends, for example, that recasting what amounts to a "refund request" as a "damages request" does not cure the deficiencies the court found with a procedure which effectively requires the automatic refund of carrier overearnings but does not permit carriers to recoup underearnings.[24] The defendants argue that consistent with *AT&T v. FCC*, the Commission must consider overall earnings in determining whether a violation of a prescribed rate of return and the Communications Act has occurred.[25] The defendants maintain that to the extent that their earnings for overall interstate access service did not exceed the allowed 12.25 percent, there can be no violation of the Act regardless of earnings realized in individual interstate access categories. The defendants add that *Ohio Bell*, issued after the release of the *MCI Liability Order*, reaffirms the proposition established in *AT&T v. FCC* that the Commission cannot award damages for carrier earnings without allowing the carrier to re-coup or off-set underearnings.[26] Defendants argue that these propositions are not confined to the Commission's ratemaking activities under Sections 204-205 of the Act[27] but are equally applicable when the Commission decides private complaints for damages under Section 208 of the Act.

10. A number of the defendants also argue that any Commission order requiring a carrier to make refunds solely because the carrier has exceeded the authorized rate of return would constitute unlawful retroactive

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[19] The defendants are Southwestern Bell Telephone Company (SW Bell); Southern Bell Telephone Company (Southern Bell) and South Central Bell Telephone Company (South Central Bell) (collectively the "BellSouth Companies"); Pacific Bell; New England Telephone Company (NET) and New York Telephone Company (NYT) (collectively the "NYNEX Companies").

[20] The interstate access service categories are special access, common line, and switched traffic sensitive. *See* 47 C.F.R. § 65.702. The monitoring reports filed by the various defendants recite that for the period January 1, 1987 through December 31, 1988, SW Bell earned returns in the switched traffic sensitive category of 16.27 percent in Kansas and 12.43 percent in its remaining territories and earned a return in the special access category of 12.76 percent; Southern Bell earned returns in the switched traffic sensitive category of 16.30 percent in Florida, 14.44 percent in Georgia, 17.94 percent in North Carolina, and 15.82 percent in South Carolina; South Central Bell earned returns in the switched traffic sensitive category of 14.67 percent in Alabama, 13.30 percent in Kentucky, 14.98 percent in Louisiana, 13.26 percent in Mississippi, and 14.06 percent in Tennessee; Pacific Bell earned returns of 13.37 percent in the special access category and 14.83 percent in the switched traffic sensitive category; NET earned a return of 13.24 percent in the switched traffic sensitive category; and NYT earned a return of 12.72 percent in the switched traffic sensitive category.

[21] The arguments and claims made by the various defendants are, for the most part identical in their essentials. For convenience, we refer to the defendants' arguments as if they were part of the same pleading. To the extent that individual defendants make unique or separate arguments, we will address them accordingly.

[22] *See, e.g.*, Pacific Bell Br. at 4-5; SW Bell Br. at 2-7.

[23] 949 F.2d 864 (6th Cir. 1991) (*Ohio Bell*). In *AT&T v. FCC*, the court invalidated the Commission's procedure to enforce its rate of return prescriptions through automatic refunds of carrier overearnings to customers. In *Ohio Bell*, the court, relying on the D.C. Circuit's decision in *AT&T v. FCC*, vacated a Commission order which had directed refunds of LEC earnings in excess of the authorized rate of return for the special access category over a period of years in the context of a strategic pricing investigation. *Ohio Bell*, 949 F.2d at 874. The Sixth Circuit placed considerable weight on the statement in *AT&T v. FCC* indicating that the Commission viewed its rate of return prescription as both minimum and a maximum ceilings on carrier earnings. 949 F.2d at 878, citing *AT&T v. FCC*, 836 F.2d at 1390. The Commission had since clarified, however, that it does not view a rate of return prescription as both a maximum and a minimum:

> [o]ur accumulated experience with rate of return prescriptions, and our review of the cost of capital evidence in this proceeding, convince us that there is no such point. * * * We believe there is a substantial gap between an earnings level that is fully adequate to assure attraction of capital on favorable terms, and an earnings level which, if sustained over time, would be confiscatory.

Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, 5 FCC Rcd 7507, 7532 (1990), *appeal docketed sub nom. Illinois Bell Telephone Co. et al. v. FCC*, No. 90-1020 (D.C. Cir. Jan. 11, 1991).

[24] *See, e.g.*, BellSouth Companies Br. at 7-8.

[25] *See* BellSouth Companies Br. at 11-12.

[26] *Id.* at 14-15.

[27] 47 U.S.C. §§ 204-205.

ratemaking.[28] The defendants argue that rates charged in conformity with a lawfully filed tariff cannot then be found to be unjust and unreasonable merely because they later proved to be too profitable.[29]

11. Each of the defendants argues that all of NTS' claims are barred by Section 415 of the Act, which establishes a two-year statute of limitations on the filing of complaints.[30] According to the defendants, Section 415 bars the recovery of any damages if sought more than two years after the occurrence of any overearnings, in these cases thus barring all recovery sought after December 31, 1988.[31]

2. Discussion

12. We have carefully examined the record before us and conclude that the defendants, most of whom were defendants in the MCI complaint proceedings, have cited no facts and have made no arguments here that would warrant a ruling contrary to the *MCI Liability Order*.

13. *Failure to State a Cause of Action:* In the *MCI Liability Order*, we rejected identical claims made by the same defendants and held that *AT&T v. FCC* establishes no precedent that bars an individual complainant from seeking a remedy under Section 208 of the Act for damages based on a carrier's reported overearnings.[32] Specifically, we stated that

> we are not persuaded by the defendants' claims that earning in excess of a prescribed rate of return does not violate that Act or, if it does, that the Commission *is required* to take a carrier's underearnings as well as its overearnings into account in determining whether a violation has occurred.
>
> * * * * * * *
>
> We find that a valid prescription bound the defendants to a maximum earnings limitation, and the defendants admit that they earned in excess of that amount during the period in question.[33]

We found further that *AT&T v. FCC* did not govern Section 208 complaint proceedings. The Commission has the authority to order a carrier to pay damages if a complainant meets the burden of establishing both a violation of the Act and the actual injury.[34]

14. *Retroactive Ratemaking.* We have held in the *MCI Liability Order* that enforcement of a rate of return prescription is not retroactive ratemaking because the obligation being enforced was set prospectively when the prescription was adopted.[35] Defendants have not persuaded us to alter our decision. We have also rejected the contention that rates charged in conformity with a lawfully filed tariff cannot be unjust and unreasonable.[36] As we stated in the *MCI Liability Order*, "legally effective, carrier-initiated tariffs can always be challenged as unreasonable and unlawful.[37] The issue raised by these complaints is not the lawfulness of high profits in the abstract, but the lawfulness of profits in excess of a prescription. Accordingly we hold that, taking into account the buffer, profits in excess of a prescription are unjust and unreasonable.

15. *AT&T v. FCC* and *Ohio Bell:* We disagree with the defendants' claim that *AT&T v. FCC* and *Ohio Bell* compel us to dismiss Telesphere's complaints. As we emphasized in the *MCI Liability Order* and reaffirmed in the *MCI Damages Order*, automatic refunds and refunds ordered under Section 204 of the Act are different from individual actions for damages under Section 208. Unlike the automatic refund mechanism in *AT&T v. FCC* or the refund procedure in *Ohio Bell*, both of which resulted from rulemaking proceedings initiated at the Commission's discretion, individual actions for damages under Section 208 are initiated by private parties seeking damages for injuries to themselves; those private parties have the burden of establishing both a violation of the Act and actual injury.[38] The courts in *AT&T v. FCC* and *Ohio Bell* did not discuss private complaints for damages; they did not invalidate private actions for damages; and their holdings are not applicable to the different separately authorized complaint procedure set forth in Sections 206-209. Accordingly, those decisions do not require us to depart from our holding in the *MCI Liability Order* that defendants have violated the Communications Act by earning in excess of a valid rate of return prescription, thereby making their rates unjust and unreasonable under Section 201 of the Communications Act and themselves liable for damages to the extent a complainant/customer can establish that it was damaged as a result of the violation.[39]

16. *Statute of Limitations:* We held in the *MCI Liability Order* that the date a carrier files its final rate of return monitoring report is dispositive with regard to the date a complainant discovers the right or wrong or the facts on

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[28] *See, e.g.*, BellSouth Companies Br. at 10; SW Bell Br. at 6. SW Bell argues specifically that under a recent Court decision, *Illinois Bell v. FCC*, 966 F.2d 1478 (D.C. Cir. 1992) (*Illinois Bell)*, the Commission may only engage in prospective ratemaking when the investigative and accounting requirements of § 204(a) have not been met. We reject defendant's claim that the decision in *Illinois Bell* somehow leaves this Commission only with Section 205 authority in the face of a violation of our rate of return prescription. As we explained in the *MCI Damages Order*, *Illinois Bell* addresses the Commission's authority under Section 204, not Section 208. *See MCI Damages Order* at para. 27. The defendants' claim that the *Illinois Bell* decision deprives the Commission of authority to award damages for violations of a valid rate of return prescription has no merit.

[29] *See, e.g.*, NYNEX Companies Br. at 6-8.

[30] Section 415 provides, in pertinent part, that "[a]ll complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after...." 47 U.S.C. § 415(b) (1982). The term "overcharges" is defined in Section 415 "to mean charges for services in excess of those applicable thereto under the schedules of charges lawfully on file with the Commission." 47 U.S.C. § 415(g) (1982).

[31] *See, e.g.*, SW Bell Br. at 7-9.

[32] *MCI Liability Order*, 5 FCC Rcd at 222-3.

[33] *MCI Liability Order*, 5 FCC Rcd at 223 [emphasis in the original; footnote omitted].

[34] *Id.*

[35] *Id.* at 222.

[36] *Id.*

[37] *Id.* at 222, quoting *Arizona Grocery v. Atchison, T & S.F.R. Co.*, 284 U.S. 370, 384 (1932).

[38] *See MCI Liability Order*, 5 FCC Rcd at 222-23, para. 55.

[39] *Id.* at 226, para. 86.

which such knowledge is chargeable as a matter of law.[40] Defendants have made no argument that persuades us to alter this determination. Accordingly, Section 415 poses no bar to NTS' complaints.

B. Damages and Interest Claims

17. NTS' damages claims rest primarily on the contention that the proper measure of damages it incurred as a result of the defendants' rate of return prescription violations is the difference between the amount it actually paid the defendants for interstate access services during the January 1, 1987 through December 31, 1988 monitoring period and the amount it would have paid if the defendants' rates produced earnings that did not exceed the Commission's prescription. The defendants, however, have raised a number of challenges to NTS' damages claims, including a number of arguments that were previously considered and rejected by the Commission in the *MCI Liability Order* and the *MCI Damages Order*. We address the parties' contentions below.

1. Damages

a. Contentions of the Parties

18. As referenced above, NTS' damages claims rest primarily on the contention that the proper measure of the damages it incurred as a result of defendants' violations is the difference between the amount it actually paid defendants for interstate access services during the January 1, 1987 through December 31, 1988 period and the amount it would have paid if the defendants' rates had produced earnings that did not exceed the Commission's prescribed rate of return.[41] In the *Discovery Order*, the Bureau stated that it tended to agree, in principle, that a possible measure of the damages stemming from defendants' rate of return violations could be that difference.[42] The Bureau was not persuaded on the record before it, however, that a damages determination based solely on such a measure necessarily reflected actual damages incurred by NTS.[43] The defendants were invited to submit evidence that could serve to mitigate or otherwise reduce NTS damages claims. Specifically, the Bureau stated that evidence demonstrating that NTS' share of excessive earnings realized in a particular access category by a defendant could be offset or otherwise reduced due to facts and circumstances surrounding NTS' purchase of other interstate access services from such defendant for the relevant monitoring period might be relevant.[44]

19. In its brief, NTS does not state or otherwise identify the specific amount of damages it seeks from any of the defendants. Instead, it represents, without qualification or amplification, that the damage amounts are set forth in defendants' responses to interrogatories that requested the defendants to perform damages computations in accordance with the stated measure of damages. Applying the measure of damages advocated by NTS, and based on information provided by the defendants, NTS seeks to recover payments made by NTS that contributed to the following defendants' overearnings in the switched traffic sensitive access service category and/or special access category, exclusive of interest, as follows: SW Bell - $409 and Pacific Bell - $23,000.These amounts were all derived by the respective defendants and represent the difference in the amounts defendants charged NTS for switched traffic-sensitive access or special access services and the amounts that would have been charged had the defendants' switched traffic-sensitive access rates produced earnings at the Commission's prescribed level. In the case of defendants Southern Bell, South Central Bell, NET and NYT, NTS has not submitted information to reflect whether or to what extent it actually purchased access services from these defendants in categories in which the defendants violated the Commission's rate of return prescription.

20. The defendants challenge NTS' damages claims on a number of grounds, raising several arguments that were previously considered and rejected by the Commission in the *MCI Liability Order* and the *MCI Damages Order*. Defendants contend that by simply basing its damages claims on a calculation of NTS' prorated share of category-level overearnings, NTS asks the Commission to award it damages in the same amounts it would have received under the automatic refund rule invalidated by the court in *AT&T v. FCC*.[45] The defendants maintain that such a result is expressly precluded by *AT&T v. FCC* as well as the court's decision in *Ohio Bell*. A number of the defendants add that the decision of the court in *Illinois Bell* also establishes that the Commission has no authority to award refunds if it has not first suspended the applicable rates under Section 204 of the Act.[46] These defendants argue that because the Commission never issued an accounting order pursuant to Sec-

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[40] In the *MCI Liability Order* we stated:

> the defendants filed the rate of return monitoring reports which...were developed by the Commission for several purposes, including making information about carrier earnings public[ly] available. Moreover, the monitoring reports relied on by MCI in its complaints were specifically designated by the Commission as a "final" and conclusively binding determination of a carrier's earnings.

5 FCC Rcd at 225. We note further that, we have held that Section 415(e) is inapplicable to the type of complaints we deal with here. Section 415(e) concerns a carrier's liability to its customers for failure to transmit a message in accordance with its common carrier obligations. The instant complaints deal with the lawfulness of defendants' rates, not defendants' transmissions or obligations to transmit messages properly. *See MCI Reconsideration Order*, 5 FCC Rcd at 3464.

[41] NTS Br. at 2, citing *Louisville & Nashville R. Co. v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925); *Southern Pacific Co. v. Darnell-Taenzer Co.*, 245 U.S. 531 (1918); *Adams v. Mills*, 286 U.S. 397 (1932); *Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221 (D.C. Cir. 1980) (*ARINC*), *cert. denied*, 451 U.S. 920 (1981).

[42] *Discovery Order*, 7 FCC Rcd at 3960, para. 6.

[43] *Id.*

[44] *Id.*

[45] The defendants contend that *Ohio Bell* makes clear that it was the end result of the automatic refund mechanism, not the mechanism itself, that was unlawful.

[46] 966 F.2d at 1481.

tion 204, the Commission "has no authority to order refunds of those rates, regardless of whether it labels them 'refunds' or 'damages'."

21. Defendants next contend that, even if *AT&T v. FCC* and *Ohio Bell* do not preclude an award of damages, NTS' damages claims still fail because NTS' complaints do not establish a valid cause of action. According to defendants, to pursue a damages claim, NTS must first show that the defendants charged unjust and unreasonable rates for interstate access services during the period in question, not that defendants' rates produced excessive returns in individual service categories. Moreover, defendants argue, Section 206 of the Act[47] requires NTS to prove injury, causation, and the amount of damages in addition to establishing a violation of the Act.[48] Defendants maintain that by simply referencing defendants' earned rates of return for individual access service categories, NTS has not only failed to allege any facts that would establish that defendants' rates were unjust and unreasonable during the period in question but has also failed to show that it sustained actual damage as a result of those rates.[49]

22. The defendants also contend that an award of damages to NTS based on carrier overearnings is inappropriate for equitable and policy reasons.[50]

23. The defendants further contend that NTS' claims for damages are flawed because NTS simply assumes that lower rates would have produced lower earnings and offers no probative evidence to show what a reasonable rate would have been or to otherwise support its damages claims.[51] The defendants claim, in effect, that NTS would receive a windfall if it has passed the "overcharges" on to its customers and is now awarded damages.[52] Pacific Bell maintains that, should the Commission award damages to NTS, the Commission should order NTS to pass the damages through to its end users in the form of a rate reduction.[53]

24. Finally, the defendants argue that even if the Commission determines that damages are lawful and appropriate, any damages award to NTS on overearnings must be reduced to the extent that NTS purchased services from defendants in other access categories that produced underearnings. Pacific Bell[54] and SW Bell[55] have submitted information in which they indicate no offsets attributable to NTS' 1987-1988 access service purchases. SW Bell contends nevertheless that the Commission should take into account NTS' purchase of access services from SW Bell in the initial 1985-1986 monitoring period in assessing NTS' damages claims.[56] SW Bell argues that to the extent that NTS benefitted from low rates during that initial period, its damages should be reduced accordingly.[57] As stated above, NTS failed to submit any reliable information that would provide a basis for assessing damages against the defendants Southern Bell, South Central Bell, NET, and NET.[58] In addition, in responding to interrogatories propounded by NTS, NET and NYT state that their billing records do not reflect any payments by NTS for switched access services during the 1987-1988 monitoring period.[59]

25. For its part, NTS does not dispute the offset amounts claimed by any of the defendants or otherwise challenge the defendants' claims regarding NTS' purchase of interstate access services from defendants during the period covered by the complaints.

b. Discussion

26. *AT&T v. FCC and Ohio Bell:* The defendants' claims that the holdings in *AT&T v. FCC* and *Ohio Bell* control these proceedings and bar an award of damages to Telesphere are without merit for the reasons stated in both the *MCI Liability Order* and the *MCI Damages Order*. In the liability section above, we again emphasized that the court in *AT&T v. FCC* explicitly acknowledged the Commission's authority to order a carrier to disgorge earnings in excess of a rate of return prescription,[60] finding only the remedy component of the Commission's rate of return prescription (the automatic refund mechanism) to be unlawful.[61] More to the point, we emphasized that "the [*AT&T v. FCC*] opinion does not address Section 208 complaint proceedings nor purport to alter the statutory

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[47] *See* 47 U.S.C. § 206.

[48] *See, e.g.*, BellSouth Companies Br. at 18; SW Bell Br. at 5-6.

[49] *See, e.g.*, BellSouth Companies Br. at 18-20. The defendants contend that the principle that NTS must still prove it was damaged and in what amount was established by the Supreme Court in *Southern Ry. Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 454-55 (1979) (*Seaboard*), in construing relevant sections of the Interstate Commerce Act. The Court stated:

> [O]ur sole concern is the Commission's decision not to investigate under § 15(8)(a) [204], a decision that has only two final consequences. First, the burden of proof with regard to *reasonableness* is placed on the shipper under § 13(1) [208] rather than on the carrier, who would have borne it in a § 15(8)(a) [204] proceeding. (With respect to all other aspects of lawfulness, however, the burden is borne by the shipper in both proceedings.) Second, the shipper's relief, if unlawfulness is proved, is limited under § 13(1) [208] to actual damages rather than the full refund of overcharges available under § 15(8)(a) [204].

The defendants contend that this ruling has been found applicable to proceedings under the Communications Act. *See ARINC*, 642 F.2d at 1235 n.35. Here too, as we determined in the *MCI Damages Order*, the defendants' reliance on case precedent is misplaced. *MCI Damages Order* at n.59.

[50] *See, e.g.*, SW Bell Br. at 6.

[51] *See, e.g., id.* at 7-8; SW Bell Br. at 5-6.

[52] *See, e.g.*, SW Bell Br. at 5-7.

[53] *See, e.g.*, Pacific Bell Br. at 7-8.

[54] *See* Pacific Bell Response to Complainant's Interrogatories, filed Sept. 10, 1992.

[55] *See* SW Bell's Response to Complainant's Interrogatories, filed Sept. 14, 1992.

[56] SW Bell Br. at 6-8.

[57] *Id.*

[58] We note that NTS was afforded ample opportunity during the discovery phase of these proceedings to seek and obtain information from each of the defendants necessary to pursue its damages claims. *See Discovery Order.*

[59] *See* NYNEX Companies' Response to Interrogatories at 3.

[60] *AT&T v. FCC*, 836 F.2d at 1392 ("Thus, as we previously have concluded, the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate of return prescription").

[61] Indeed, the court in *Ohio Bell* recognized the continuing efficacy of our rate of return framework. *See* 949 F.2d at 868.

scheme of the Act or the remedies Congress established therein."[62] Similarly, as we stated in the *MCI Damages Order*, the *Ohio Bell* decision does not expand upon *AT&T v. FCC* and does not address the Commission's authority to award damages in private complaint actions under Section 208 of the Act.[63]

27. *Section 201(b) of the Act:* We turn now to the defendants' contention that NTS' damages claims must be dismissed because NTS has failed to prove defendants' rates were unjust and unreasonable within the meaning of Section 201(b) of the Act. In the liability section above, we held that the complainant met its burden of proof by establishing that the defendants violated our rate of return prescription.[64] Accordingly, the question before us now is not whether defendants' rates were unjust and unreasonable; rather the question is whether the complainant suffered any measurable damage as a consequence of paying rates previously determined by the Commission to be unlawful under Section 201(b).

28. The defendants' claim that even if NTS has sustained its burden and shown that defendants' rates were unjust and unreasonable, its damages claims must still fail because judicial precedent compels NTS to establish what a just and reasonable rate would have been as a prerequisite to recovering damages is also unavailing. This argument was previously considered and rejected in the *MCI Damages Order*. We emphasized in that decision the Commission's authority to prescribe and enforce carriers' rates of return.[65] We also pointed out that the issue in these rate of return complaint proceedings is not whether individual rates are unlawful, but whether cumulative rates that produced earnings over and above a prescribed rate of return are unjust and unreasonable.[66] Accordingly, we held that the Bureau had properly determined in the *Discovery Order* that a proper starting point for assessing damages based on violations of a rate of return prescription is to look at the difference between the amount complainant paid for defendants' interstate access services and the amount it would have paid if defendants had charged rates that produced returns within the Commission's prescribed levels.[67] NTS has shown that it purchased services from defendants at rates that produced earnings over and above the defendants' prescribed levels. We find this showing to be a proper starting point for assessing the damage NTS suffered as a result of paying defendants' rates that produced such earnings.

29. *Damages and Offsets:* The defendants' arguments are devoted primarily to attempting to persuade the Commission that NTS' damages claims are really claims for restitution or refunds governed by equitable or public policy considerations. These considerations, according to defendants, militate against any award of damages to NTS based on excessive earnings. The defendants argue, in effect, that the damages NTS seeks are equivalent to refunds that would have been required under the refund mechanism invalidated by the court in *AT&T v. FCC*. We do not agree. We are concerned here with determining whether a particular customer, which has availed itself of a statutory complaint remedy under Title II of the Act, has sustained any measurable damage that can be traced to defendants' violations of "the Act. Although a damages award under Section 208 of the Act might well be equal or substantially similar to a refund ordered under Section 204 of the Act,[68] this does not transform a private complaint action into a public enforcement proceeding subject to broad public interest considerations.

30. Consistent with our decisions in the *MCI Damages Order*, we find defendants' arguments with respect to "passing-on" to be unavailing. In rejecting this same argument, we said, "[w]hether [complainant] passed on the overcharges or absorbed them does not alter the fact that the defendants overcharged [complainant] in violation of a binding rate of return prescription and must answer for such violations." [69] The issue is not what NTS has done in response to paying excessive rates, but whether it has been damaged as a result of these excessive rates.

31. Nor can we accept the defendants' related claim that we should require NTS to flow through any damages it may receive to its end user customers. Sections 206-209 of the Act give private parties the right to file complaints challenging the acts or omissions of carriers and to recover monetary damages resulting from such acts or omissions. Complainants, however, are charged, as NTS is in the instant cases, with the burden of establishing violations of the Act or Commission rule or order and the amount or extent of damage suffered as a consequence of such violations. Accepting defendants' flow through argument would, in effect, transform NTS' complaints into class action suits on behalf of its customers, a result neither expressly contemplated by nor consistent with the private remedy created under Sections 206-209 of the Act.

32. We find the defendants' other equitable arguments regarding alleged windfalls to NTS should it receive the damages it seeks to be unavailing for the reasons stated in the *MCI Damages Order*.[70]

33. We do find, however, that certain of the defendants have made persuasive claims for offsets. At the outset, we find itx significant that NTS elected not to respond to the defendants' offset claims or otherwise attempt to develop additional information on the question of damages. Given the clear discovery and briefing guidelines and schedules established by the Bureau, we can reasonably conclude that

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[62] *MCI Liability Order*, 5 FCC Rcd at 223, para. 56.

[63] *MCI Damages Order* at para. 26.

[64] In the *MCI Liability Order*, we held that the complainant therein could prove that defendants' rates were unjust and unreasonable by proving that the defendants violated our rate of return prescription. *See MCI Liability Order*, 5 FCC Rcd at 226.

[65] For a full discussion of the Commission's authority to prescribe and enforce carriers' rates of return, *see MCI liability Order*, 5 FCC Rcd 222-223.

[66] *MCI Damages Order* at para. 29.

[67] *Id.*

[68] *See Seaboard*, 442 U.S. 444, 455, n.8:

> If a shipper proves a rate is unreasonable and that he was damaged in the full amount he was overcharged, the outcome of a § 13(1) [§ 208] proceeding will be no different than that of a § 15(8)(a) [§ 204] proceeding in which the carrier fails to establish the reasonableness of the rate.

[69] *MCI Damages Order* at para. 31.

[70] *Id.* at para. 32.

NTS does not dispute claims by certain of the defendants that NTS' damages should be reduced to the extent that NTS purchased interstate access services from the defendants' at rates that produced earnings below the prescribed levels. We also conclude that NTS has failed to sustain any damages claims against defendants Southern Bell, South Central Bell, NET, and NYT.

34. As for NTS' damage claims against Pacific Bell, the record establishes that Pacific Bell's overearnings in the switched traffic sensitive category attributable to NTS billings total $23,000. Pacific Bell has made no persuasive showing that it is entitled to offsets against this amount. Accordingly, we award damages to NTS from Pacific Bell in the amount of $23,000.

35. With respect to SW Bell, the record establishes that SW Bell's overearnings with respect to NTS in the switched traffic sensitive category total $409. SW Bell has made no persuasive showing that it is entitled to offsets against this amount. It has provided no support or rationale for its contention that we should take into account earning levels realized outside the relevant 1987-1988 monitoring period in assessing NTS' damages claims. Therefore, we award NTS damages from SW Bell in the amount of $409.

2. Interest on Damages Awards

a. Contentions of the Parties

36. Pacific Bell and SW Bell claim that NTS is not entitled to prejudgment interest should the Commission award damages to NTS.[71] The defendants ground their claim on the contention that the amount of damages has been sharply disputed in these proceedings. The defendants further contend that interest would penalize them even though they have not been accused of deliberate wrongdoing. Moreover, the defendants contend, interest is not necessary to make NTS whole.

37. NTS, for its part, simply contends that it is entitled to prejudgment interest in connection with any ultimate damages award. NTS does not, however, specify an appropriate interest rate or otherwise attempt to compute interest on its claimed damages.

b. Discussion

38. In deciding whether to award interest in a particular common carrier complaint case we are generally guided by federal court practice, where the award of prejudgment interest "... is a matter left to the sound discretion of the trial court."[72] The award of interest in a common carrier complaint case is thus guided by considerations of fairness. Applying this standard, we are persuaded that an award of interest is appropriate in these cases. NTS was effectively deprived of the use of the excessive amounts it paid defendants as a result of their unlawful rates while the defendants, on the other hand, enjoyed the beneficial use for a substantial period of time of funds to which NTS rightfully has a claim. We are persuaded that interest is required not only to effect a full and fair remedy for NTS, which paid rates higher than it would have paid had defendants earned within the prescribed level, but also to avoid any unjust enrichment of defendants stemming from its charging rates that we have determined to be unjust and unreasonable under Section 201(b) of the Act.[73] We conclude that interest should be computed at the IRS rate for tax refunds.[74] In addition, we find that interest should begin to accrue from January 1, 1989, the day after which the 1987-1988 monitoring period ended. At that point, the defendants were subject to the earnings limitations of a new monitoring period. Accordingly, we award interest calculated at the IRS rate for tax refunds[75] from Pacific Bell and Southwestern Bell Telephone Company to NTS from January 1, 1989 until the date of full payment to NTS.

IV. CONCLUSION

39. We have carefully reviewed the extensive record before us and have found, to the extent indicated here, that complainant is entitled to an award of damages, plus accumulated interest on such damages, from Pacific Bell and SW Bell for violations of the Commission's rate of return prescription for the 1987-1988 monitoring period.

V. ORDERING CLAUSES

40. Accordingly, IT IS ORDERED, pursuant to Section 4(i), 4(j), 201, 206, 207, 208 and 209 of the Communications Act, as amended, 47 U.S.C. §§ 4(i), 4(j), 201, 206, 207, 208 and 209, that the above-captioned complaints filed by Telesphere ARE GRANTED to the extent indicated above and otherwise ARE DENIED.

41. IT IS FURTHER ORDERED that the above-named Pacific Bell SHALL PAY to NTS the sum of $23,000 (Twenty-three thousand dollars) within 60 days after the release date of this Memorandum Opinion and Order; and that SW Bell SHALL PAY to NTS the sum of $409 (Four hundred nine dollars) within 60 days after the release date of this Memorandum Opinion and Order.

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[71] Because we conclude that NTS has not sustained damages claims against the remaining defendants, we do not reach the issue of interest as to these defendants.

[72] *United States v. California Board of Equalization*, 650 F.2d 1127, 1132 (9th Cir. 1981), *aff'd*, 456 U.S. 901 (1982), *reh'g denied*, 456 U.S. 985 (1982).

[73] *See New England Telephone and Telegraph Co. v. FCC*, 826 F.2d 1101, 1113 (D.C. Cir. 1987), *cert. denied*, 109 S. Ct. 1942 (1989) (carriers may reasonably be required "to pay full interest for earnings they had no right to retain in the first place.").

[74] We believe that the rationale adopted by the Commission for applying the IRS rate in pole attachment complaint proceedings under Section 204 of the Act, 47 U.S.C. § 204, is equally applicable here. In Teleprompter of Fairmont v. C&P of West Virginia, 79 FCC 2d 232 (1980), the Commission stated

> As a matter of fairness, we believe that the rate of interest applied in a pole attachment complaint proceeding should be readily available, easily applied, and periodically revised to reflect changes in borrowing costs. In light of these considerations, we find the interest rate for federal tax refunds and additional tax payments suitable for use in this type of proceeding. This rate appears in a variety of easily obtained official and commercial publications, and is revised on a regular basis. [Footnote omitted.]

79 FCC 2d at 238.

[75] The applicable IRS rates are set forth in Appendix A.

42. IT IS FURTHER ORDERED that the above-named Pacific Bell and SW Bell SHALL PAY to NTS interest on the damages awarded here at the relevant IRS rates as set forth in Appendix A from January 1, 1989 until the date full payment is made.

43. IT IS FURTHER ORDERED that the Motion to Serve Request for Production of Documents filed by NET and NYT on August 10, 1992, IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Effective Period	Rate	Internal Revenue Service Citation
01/01/87 - 03/31/87	8%	Rev.Rul. 146, 1986-2 C.B. 208
04/01/87 - 06/30/87	8%	Rev.Rul. 87-23, 1987-13 I.R.B. 46
07/01/87 - 09/30/87	8%	Rev.Rul. 87-62, 1987-29 I.R.B. 10
10/01/87 - 12/31/87	9%	Rev.Rul. 87-87, 1987-36 I.R.B. 8
01/01/88 - 03/31/88	10%	Rev.Rul. 87-131, 1987-50 I.R.B. 6
04/01/88 - 06/30/88	9%	Rev.Rul. 88-17, 1988-10 I.R.B. 6
07/01/88 - 09/30/88	9%	Rev.Rul. 88-50, 1988-25 I.R.B. 39
10/01/88 - 12/31/88	10%	Rev.Rul. 88-86, 1988-41 I.R.B. 1
01/01/89 - 03/31/89	10%	Rev.Rul. 88-105, 1988-51 I.R.B. 4
04/01/89 - 06/30/89	11%	Rev.Rul. 89-36, 1989-1 C.B. 309
07/01/89 - 09/30/89	11%	Rev.Rul. 89-69, 1989-1 C.B. 310
10/01/89 - 12/31/89	10%	Rev.Rul. 89-99, 1989-2 C.B. 256
01/01/90 - 03/31/90	10%	Rev.Rul. 89-125, 1989-2 C.B. 257
04/01/90 - 06/30/90	10%	Rev.Rul. 90-19, 1990-1 C.B. 186
07/01/90 - 09/30/90	10%	Rev.Rul. 90-47, 1990-1 C.B. 187
10/01/90 - 12/31/90	10%	Rev.Rul. 90-71, 1990-35 I.R.B. 4
01/01/91 - 03/31/91	10%	Rev.Rul. 90-94, 1990-46 I.R.B. 16
04/01/91 - 06/30/91	9%	Rev.Rul. 91-20, 1991-11 I.R.B. 1
07/01/91 - 09/30/91	9%	Rev.Rul. 91-33, 1991-21 I.R.B. 1
10/01/91 - 12/31/91	9%	Rev.Rul. 91-50, 1991-37 I.R.B. 1
01/01/92 - 03/31/92	8%	Rev.Rul. 91-65, 1991-51 I.R.B. 1
04/01/92 - 06/30/92	7%	Rev.Rul. 92-21, 1992-14 I.R.B. 14
07/01/92 - 09/30/92	7%	Rev.Rul. 92-44, 1992-24 I.R.B. 86
10/01/92 - 12/31/92	6%	Rev.Rul. 92-77, 1992-38 I.R.B. 12

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Extension of Filing Date for Annual
Report Form M

ORDER

Adopted: February 5, 1993; Released: February 9, 1993

By the Chief, Industry Analysis Division:

1. Pursuant to Sections 1.785 and 43.21 of the Commission's Rules, telephone carriers having annual revenues in excess of $100 million are required to file the Annual Report Form M (Form M) with the Commission not later than March 31 of each year, covering the preceding calendar year.

2. Last fall, the Chief of the Common Carrier Bureau released an Order Inviting Comments (Order)[1] proposing to modify the Form M by eliminating thirteen schedules, and to revise and complete the automation of Form M by incorporating eighteen other Form M schedules into the Commission's Automated Reporting Management Information System (ARMIS). Comments and reply comments have been received in this proceeding and a number of parties requested an extension of the Form M filing date because of (1) the large number of schedules being mechanized and revised, (2) the addition of a new plant schedule, and (3) the revision of the reporting format. An order resolving these and the other matters raised in the Order has not yet been issued.

3. It has been the policy of the Commission to ease reporting burdens whenever possible. In that regard, we will extend the filing date for the Form M reports until the Common Carrier Bureau addresses the issues in AAD 92-46. At the time the Bureau addresses those issues we anticipate it should become clear when the reports for calendar year 1992 and beyond will be required.

4. Accordingly, IT IS ORDERED, That pursuant to Sections 0.91(a), 0.291 and 1.3 of the Commission's Rules, an extension of the filing date for the 1992 Form M until the Bureau issues an order in AAD 92-46 IS GRANTED for all carriers.

FEDERAL COMMUNICATIONS COMMISSION

Peyton L. Wynns, Chief
Industry Analysis Division
Common Carrier Bureau

[1] Revision of ARMIS USOA Report (FCC Report 43-02) for Tier 1 Telephone Companies and Annual Report Form M, *Order Inviting Comments*, 7 FCC Rcd 6669 (1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Audit Costs of the National Exchange Carrier Association, Inc. Billed to Subset I Companies	AAD 91-24

MEMORANDUM OPINION AND ORDER

Adopted: January 14, 1993; Released: February 11, 1993

By the Commission:

I. INTRODUCTION

1. On May 14, 1991, Southwestern Bell Telephone Company (SWBT) and Pacific Bell (Pacific) filed a "Joint Petition for Waiver or in the Alternative Motion to Modify" the Commission's November 9, 1990 Letter[1] directing the National Exchange Carrier Association (NECA) to bill all Subset I carriers[2] for the costs associated with two audits of NECA. The Commission also required that Subset I carriers charge the audit costs below the line. Petitioners request that the Commission permit NECA to spread the costs of both audits among all NECA members as an administrative expense of doing business and permit Subset I carriers to book the costs above the line.

2. For the reasons stated below, we grant in part, and deny in part, the joint petition. We continue to require that the Subset I carriers pay the bulk of the audit costs, but we allow them to book the costs above the line. We defer addressing the ultimate ratemaking treatment of those costs until such time as we address the findings in the audit that generated most of those costs. We also allow NECA to spread the costs of the other audit among NECA members as an administrative expense.

II. BACKGROUND

3. NECA is a nonprofit corporation established pursuant to Commission order[3] to develop interstate access tariffs and administer interstate access revenue pools, including the common line (CL) pool. NECA is responsible for pooling revenues derived from access charges and distributing those revenues to the local exchange carriers (LECs). On a monthly basis, NECA receives revenue, expense and investment figures from the LECs and computes each LEC's monthly share of the pools in which it participates. Initially, the figures are only estimates, but in later months they are adjusted by the LECs to the actual monthly figures. The LECs have up to 24 months following any given month to submit adjustments correcting errors or omission in that month's settlement data. The purpose of this adjustment procedure is to ensure that monthly settlement data are accurate and consistent with Commission Rules.

4. In its *November 9 Letter* to NECA, the Commission required NECA to retain an independent auditor to examine adjustments that the Subset I companies reported to NECA for 1988 and 1989 (*Adjustments Audit*), and to propose safeguards for preventing erroneous and manipulative reporting (*Safeguards Audit*). The *November 9 Letter* specifies that the costs of complying with the above requirements must be billed to all the Subset I companies with explicit instructions that the costs are to be charged below the line in Account 7360, Other nonoperating income.

5. On May 14, 1991, Pacific and SWBT filed a joint petition seeking waiver of, or in the alternative, modification of the requirements that NECA charge the costs of the audits solely to Subset I companies who, in turn, must record those costs below the line. In response to the joint petition, the Commission issued a public notice requesting comments on the petition.[4] Seven parties filed comments and one party replied.[5] On December 9, 1991, NECA filed with the Commission the independent auditor's reports with respect to the *Adjustments* and *Safeguards Audits*.[6] On March 9, 1992, petitioners, along with Ameritech, filed a motion to update the record in this proceeding informing the Commission that NECA had billed Subset I carriers $8 million to cover the independent audit costs through November 1991.

III. DISCUSSION

6. Petitioners assert (1) that below the line accounting treatment of independent audit costs is inconsistent with Part 32 of the Commission's Rules, the Uniform System of Accounts (USOA); (2) that requiring below the line accounting without affording carriers notice and the opportunity to be heard violates due process; and (3) that the costs of the audit should be borne by all NECA members in proportion to their average net investment used to determine common line revenue requirement. We address and resolve each of these issues below.

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[1] Letter from Donna R. Searcy, Secretary, FCC, to Lawrence C. Ware, Chairman of the Board of Directors, NECA, 5 FCC Rcd 7183 (1990) (*November 9 Letter*).

[2] Subset I companies consist of the Bell System Operating Companies. 47 C.F.R. §69.602.

[3] MTS and WATS Market Structure, *Third Report and Order*, 93 FCC 2d 241 (1983), *recon.*, 97 FCC 2d 682 (1983), *further recon.*, 97 FCC 2d 834 (1984), *second further recon.*, 99 FCC 2d 708, *affirmed in principle part sub. nom.*, National Association of Regulatory Utility Commissioners v. FCC, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985).

[4] *See* Pleading Cycle Established for Comments on Request for Waiver or Modification of NECA Audit Letter, 6 FCC Rcd 3328 (1991).

[5] The parties that filed Comments are The Ameritech Operating Companies (Ameritech), BellSouth Corporation, South Central Bell Telephone Company and Southern Bell Telephone and Telegraph Company (BellSouth), NECA, The Bell Atlantic Telephone Companies (Bell Atlantic), US West Communications, Inc. (US West), The United States Telephone Association (USTA) and The National Telephone Cooperative Association (NTCA). Reply Comments were filed by Ameritech.

[6] *See* Ernst & Young, Common Line Adjustments, AAD 91-24 (filed December 9, 1991) (*Adjustments Audit*); Ernst & Young, Review and Recommended Pool Safeguards, AAD 91-24 (filed December 9, 1991) (*Safeguards Audit*).

A. Accounting treatment

1. Positions of the parties

7. All parties addressing the issue dispute the Commission's requirement that Subset I carriers record the independent audit expenses below the line.[7] The parties point out that Part 32 specifically provides that costs incurred for external auditing, like other accounting and financial services, be entered above the line in Account 6721, Accounting and finance.[8] USTA argues that because the audit addresses activities that are entirely within the sphere of regulation, the costs should be billed above the line.[9] USTA states that prior Commission orders and appropriate general cost allocation principles justify handling the costs above the line, and that to the extent the audit leads to public interest benefits, those benefits will accrue to interstate ratepayers.[10] Commenters also argue that the Commission failed to provide an articulated rational basis for departing from its rules.[11] BellSouth states that the Commission cannot, on an *ad hoc* basis, lawfully order it to account for audit expenses in a manner that would violate the Commission's Rules. In their motion to update the record, petitioners request that the Commission, at a minimum, permit Subset I carriers to book these costs above the line.[12] US West notes that, should the results of the audits provide the Commission with a valid basis for disallowing the expenses of the audits for any company or group of companies, the Commission can revisit the disallowance question at that time, upon notice to the affected company or companies and an opportunity to respond.[13]

2. Discussion

8. We are persuaded by the parties that carriers should record expenses billed to them for the independent audits in Account 6721,[14] as specified in the USOA. This is an above the line account, which means that the expenses recorded in the account are presumptively allowed for ratemaking purposes. An expense recorded above the line is, however, subject to disallowance upon determination by this Commission that it would be unjust and unreasonable for ratepayers to bear that expense. We defer addressing the ultimate ratemaking treatment of the expenses of the NECA independent audits until such time as we address the independent auditor's findings in the *Adjustments Audit*.

B. Due process

1. Positions of the parties

9. Petitioners contend that the Commission has denied Subset I companies due process by failing to provide the companies notice of and the opportunity to comment on the audits and on the requirements that Subset I companies pay for the audits and charge the costs below the line.[15] The parties argue that the below the line treatment improperly imposes a penalty on all Subset I carriers without a specific finding that they have violated the Act and without notice or the opportunity to be heard.[16]

2. Discussion

10. We agree that we acted prematurely in directing that the Subset I companies record the costs of the independent audits in a below the line account. As explained above, we are rescinding that directive. By seeking comment on the petition that gave rise to the instant proceeding, we have afforded all carriers the opportunity to comment upon the requirements of the *November 9 Letter*. We have thus satisfied any applicable requirements of fairness and due process.

C. Who should pay for the audits?

1. Positions of the parties

11. Petitioners argue that Subset I carriers should not have to pay all of the expenses of the audit. Petitioners, supported by Ameritech, believe that the NECA CL pool should bear the expense of the audit pursuant to Section 69.603(h) as a category I expense related to the administration of pooled receipts.[17] They argue that the *Adjustments Audit* addresses NECA's fiduciary administration of the CL pool, including reporting procedures used by all NECA members; and that the *Safeguards Audit* involves the relationship between NECA and all its members, not just Subset I companies.

12. Petitioners also question whether the Commission's imposition of independent audit costs on Subset I carriers comports with Part 69 of the Commission's Rules, since the rules do not include authority for singling out a particular carrier or subset of carriers to bear a NECA expense.[18] According to petitioners, the expense should be spread through NECA's membership in accordance with each member's average net investment. Because Subset I carriers no longer report investment, expenses, and rev-

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[7] Petition at 1, 11; Ameritech Comments at 1-2, 8; BellSouth Comments at 1-2; NECA Comments at 5, n.12; US West Comments at 2, 6, 9, 10; USTA Comments at 2,5; Ameritech Reply at 4.

[8] Petition at 7 n.9, 9 n.12, 11; Motion at 2; Ameritech Comments at 5-7; BellSouth Comments at 1-2; Bell Atlantic Comments at 1-2; US West Comments at 3,6, 8-9; USTA Comments at 3.

[9] USTA Comments at 4, 5.

[10] USTA Comments at 3-5, *referring to* Separation of the Costs of Regulated Telephone Services from the Costs of Nonregulated Activities, *Report and Order*, 2 FCC Rcd 1298 (1987), *recon.*, 2 FCC Rcd 6283 (1987), *aff'd sub. nom.* Southwestern Bell Corp v. FCC, 896 F.2d 1378 (D.C. Cir. 1990).

[11] Ameritech Comments at 5-6; NECA Comments at 5, n.12; US West Comments at 6; Bell Atlantic Comments at 2; USTA Comments at 2-3.

[12] Motion at 3-4.

[13] US West Comments at 6.

[14] 47 C.F.R. §32.6721.

[15] Petition at i, 5-6, 8, 11; Motion at 1-2; Ameritech Comments at 3, 4-5; US West Comments at 5-6.

[16] Petition at 5,6-8; Motion at 2; Ameritech Comments at 1-2, 5, 6-7; NECA Comments at 5 n.12; Bellsouth Comments at 2; US West Comments at 3-4, 5-6; Bell Atlantic Comments at 2; Ameritech Reply at 4.

[17] Petition at i, 8-10,11; Ameritech Comments at 2,7-8; Ameritech Reply at 2-3, 4.

[18] Petition at 10; Ameritech Comments at 7; Ameritech Reply at 3.

enues for pooling purposes, petitioners state that NECA should bill Subset I carriers based on each carrier's average net investment used to determine 1989 Common Line access revenue.[19]

13. NECA, NTCA, and US West recommend that only the expenses associated with the *Safeguards Audit* be borne by NECA and its members as an administrative expense. According to NECA, the *Safeguards Audit* is the type of activity that NECA would undertake in the normal course of operations and that will directly benefit all pool members. US West argues that an audit designed to improve NECA's operations is of no benefit to US West or its ratepayers because US West no longer participates in the NECA pools except for purposes of long-term support and transitional support.[20] These parties believe, however, that Subset I carriers should still pay for the *Adjustments Audit* as specified in the Commission's *November 9 Letter*.[21] NECA states in this regard that the *Adjustments Audit* is a special purpose audit focused exclusively on Subset I carrier adjustments, and that it is out of proportion to the kind of audit activity NECA would ordinarily conduct to assure the accuracy of pooling data.[22]

14. In addition, NECA criticizes petitioners' reliance on the NECA expense recovery rules in Part 69 as support for treating these costs as a NECA administrative expense. According to NECA, Part 69 addresses how NECA expenses are to be recovered via current pool rates and other established charges but does not provide for billing audit costs directly to all NECA members in the manner proposed by petitioners.[23] NECA notes that, were we to treat all the audit expenses as NECA administrative expenses in strict accordance with Part 69, Subset I carrier responsibility would be limited to potential increases in their long-term support obligations.[24]

2. Discussion

15. We affirm our decision requiring that Subset I companies bear the expenses associated with the *Adjustments Audit*. A literal application of the Part 69 rules relating to NECA administrative expenses would produce manifestly unfair results in the present circumstances. Under Section 69.605(b) of those rules,[25] current administrative expenses are normally recovered from current pool revenues. That rule did not contemplate the possibility that NECA would incur large expenses attributable to past activities of carriers who are no longer participating in the CL pool.[26] A literal application of the rule in these circumstances would impose all of the costs of the *Adjustments Audit* upon carriers or customers of carriers who were not subject to that audit.

16. The petitioners apparently do not contend that we should not direct NECA to depart from the rule in these circumstances. The petitioners have suggested an alternative method of assessing the audit expense that also departs from the literal requirements of the Part 69 rule. Petitioners suggest allocating the audit costs in proportion to carriers' average net investment used in determining common line access revenue requirement for 1989. We believe, however, that it would be more consistent with principles of cost causation, and thus more fair, to distribute the audit costs by charging each Subset I carrier for the expenses attributable to its portion of the audit. We therefore amend the requirements of the *November 9 Letter* by directing NECA to bill each Subset I carrier for the portion of the expenses of the *Adjustments Audit* that is attributable to the auditing of adjustments reported by that carrier.

17. We agree with NECA, NTCA, and US West that the expenses associated with the *Safeguards Audit* should be treated by the NECA pool as an administrative expense. We agree with NECA that the *Safeguards Audit* is forward looking and deals with the relationship between NECA and all its members, not just Subset I carriers. We also agree with US West that any reforms that result from the *Safeguards Audit* will primarily benefit pooling carriers and their interstate ratepayers. We therefore rescind the requirement of the *November 9 Letter* that NECA bill the costs of the *Safeguards Audit* to the Subset I carriers.[27]

IV. ORDERING CLAUSE

18. ACCORDINGLY, IT IS ORDERED, pursuant to Sections 1, 4(i)-(j), 201-202, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§151, 154(i)-(j), 201-202, 205, 403, and Section 32.27 of the Commission's Rules, 47 C.F.R. §32.27, that the joint petition IS GRANTED to the extent indicated herein, and is otherwise DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[19] Petition at 9; Motion at 2.
[20] US West Comments at 7.
[21] NECA at 1, 3-4, 6; NTCA Comments at 2-3; US West Comments at 1, 7, 10.
[22] NECA Comments at 3-4.
[23] *Id.* at 5.
[24] *Id.*, n.10.
[25] 47 C.F.R. §69.605(b).
[26] The total amount billed by Ernst & Young for the *Adjustments Audit* was $8,347,290.
[27] The total amount billed by Ernst & Young for the *Safeguards Audit* was $172,000.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

Released: February 11, 1993

Robert A. McArton
Chairman of the Board of Directors
National Exchange Carrier Association, Inc.
100 South Jefferson Road
Whippany, New Jersey 07981

Dear Mr. McArton:

On November 9, 1990, this Commission required the National Exchange Carrier Association, Inc. (NECA) to retain an independent auditor to perform two audits. *See* Letter to Lawrence C. Ware, Chairman of the Board of Directors, NECA, 5 FCC Rcd 7183 (1990). In the first of these audits, the *Adjustments Audit*, the independent auditor was to review adjustments that NECA's Subset I companies reported to NECA's common line pool for 1988 and 1989. In the second or *Safeguards Audit*, the independent auditor was to recommend safeguards to prevent manipulation of NECA's processes. Our November 9 letter specified requirements for each of these audits.

NECA submitted the independent auditor's reports on these audits to the Commission on December 9, 1991. We have reviewed those reports as well as the independent auditor's workpapers for the *Adjustments Audit*. Based upon these reviews, we find that the audits complied with our November 9 letter and were performed with a high degree of skill and care. We also find that the independent auditor exercised sound professional judgment reflecting purposes of the audits and the information gathered during their course.

The independent auditor's reports contain much information regarding NECA and its member companies. The report on the *Adjustments Audit* lists numerous instances in which, in the independent auditor's opinion, the Subset I companies did not comply with the Commission's rules and policies in reporting costs and revenues to NECA. The Subset I companies dispute the findings in this report, and the report includes the companies' responses to those findings. Our investigation of these matters is continuing. As it proceeds, we will take whatever action, if any, we deem appropriate in the exercise of our own independent judgment.

The report on the *Safeguards Audit* recommends a series of measures that the independent auditor believes would help improve NECA's management and internal operations. This report makes clear that NECA has implemented, or is in the process of implementing, a number of the suggested measures. Today, we initiate a rulemaking to consider many of the independent auditor's remaining recommendations as well as additional measures to help ensure that NECA administers the interstate access tariff and revenue distribution processes in accordance with Commission rules. *See* Safeguards to Improve the Administration of the Interstate Access Tariff and Revenue Distribution Processes, *Notice of Proposed Rulemaking*, CC Docket No. 93-6, FCC 93-25 (adopted Jan.14, 1993). As that *Notice* makes clear, we believe that NECA has responded positively to our November 9 letter. We trust this constructive response will continue.

This letter was adopted by the Commission on January 14, 1993.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-496

In the Matter of

Amendment of Part 25 of the Commission's Rules and Regulations to Reduce Alien Carrier Interference Between Fixed-Satellites at Reduced Orbital Spacings and to Revise Application Processing Procedures for Satellite Communication Services	RM-4206

SECOND REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: January 14, 1993; Released: March 4, 1993

Comment Date: May 7, 1993
Reply Date: June 22, 1993

By the Commission:

TABLE OF CONTENTS

	Paragraph No.
Introduction and Background	1-3
Second Report and Order	
I. Discussion	4-5
A. Space Station Technical Standards	6
1. Telemetry, Tracking and Telecommand	7-9
2. Polarization Standards	10-11
3. Ground Commandable Saturation Flux Density	12-14
4. Full Frequency Re-Use	15-17
5. Cross-polarization Isolation	18
6. Satellite Station-keeping	19
7. Satellite Antenna Measurement	20
8. Operator Reports	21-23
B. Video and SCPC Transmissions	24-25
1. Analog Video Carrier Center Frequency Placement Standard	26-28
2. Energy Dispersal	29-32
3. Initial Analog Video Test Transmission Procedures	33-35
4. Transmitter Identification	36
C. Earth Station Technical Standards	37
1. Antenna Performance Standard	38-39
2. Manufacturers' Tests	40-41
3. On-Site Verification Measurement Procedures	42-47
4. Power Limits and Uplink Power Control	48-50
D. Inter-System Coordination Procedures	51
1. Authorization Before Transmission	52-55
Further Notice of Proposed Rulemaking	
A. Transportable Facilities	56
1. Transportable Testing	57-64
II. Conclusion	65
Paperwork Reduction Act Analysis	66
III. Ordering Clauses	67-68

INTRODUCTION AND BACKGROUND

1. By a Notice of Proposed Rule Making (NPRM)[1] in the above-referenced docket, we proposed to revise Part 25 of the Commission's rules governing the construction, licensing and operation of satellite service facilities.[2] Our primary purpose in commencing this rulemaking was to implement recommendations made by the joint industry-government Advisory Committee on Implementation of Reduced Orbital Spacing Between Domestic Fixed-Satellites (Advisory Committee) which was established to advise the Commission on efficient means of implementing 2^0 orbital spacing between domestic satellites in the 4/6 GHz and 12/14 GHz frequency bands.[3] In addition, we

[1] Notice of Proposed Rulemaking in the Matter of Amendment of Part 25 of the Commission's Rules and Regulations to Reduce Alien Carrier Interference Between Fixed-Satellites at Reduced Orbital Spacings and to Revise Application Processing Procedures for Satellite Communications Services, 2 FCC Rcd 762 (1987) (NPRM).

[2] 47 C.F.R. Part 25. The issues addressed in this proceeding pertain to fixed-satellite services only. Unless otherwise indicated, the rules apply to all fixed-satellite operations regardless of frequency band.

[3] *See* Establishment of an Advisory Committee on Implementation of Reduced Orbital Spacing Between Domestic Fixed-Satellites, 102 FCC 2d 390 (1985); Licensing of Space Stations in the Domestic Fixed-Satellite Service, 54 Rad. Reg. 2d (P&F) 577 (1983).

The 4/6 GHz frequency band (C-band) consists of the 3.7 - 4.2 GHz (downlink or space-to-Earth) and the 5.925 - 6.425 GHz (uplink or Earth-to-space) frequency bands. The 12/14 GHz frequency band (Ku-band) consists of the 11.7 - 12.2 GHz (downlink or space-to-Earth) and the 14.0 - 14.5 GHz (uplink or Earth-to-space) frequency bands.

proposed to make our licensing procedure as efficient as possible for the satellite carriers and the Commission staff while eliminating regulations that had become unnecessary.

2. In response to our NPRM, seventy-one entities filed comments and twenty-three entities filed replies on various aspects of the proposed rules.[4] Although there was general agreement on our proposed rules codifying our licensing procedures,[5] the views of the commenters with respect to our proposed technical and service rules vary widely and reflect the differences in the nature of services each commenter provides. Many commenters state that some rules would burden licensees and question the proposed rules' technical and economic feasibility.[6] Most commenters support the proposed rules, however, requesting clarification of some proposed sections and recommending minor modifications of others.

3. The First Report and Order in this docket[7] dealt with the administrative and procedural aspects of the NPRM. This Second Report and Order adopts as final rules many of the technical proposals proposed in the NPRM. The issue of temporary-fixed (transportable) earth station testing will be addressed in the Further Notice of Proposed Rulemaking we also adopt today.

SECOND REPORT AND ORDER

I. Discussion

4. The rules we adopt in this order represent the codification of established industry practice, Commission policy and procedures, Advisory Committee recommendations and operator input.[8] These rules are a response to the enormous growth in the satellite communications industry since its inception, a growth that required us to reduce the spacing between domestic satellites to two degrees,[9] thus increasing the chance of harmful interference.

5. The goal of this rulemaking proceeding is to prevent harmful interference between satellites and to minimize the impact if unintentional harmful interference does occur. Interference to satellite communications can result from two sources. The first is interference between earth stations and terrestrial microwave facilities operating in the same frequency bands. Interference between terrestrial facilities and earth stations is addressed by the current frequency coordination procedures of Part 21 and 25.[10] The second source of interference is between satellite facilities. This interference can be inter-satellite, which occurs when transmissions to or from one satellite network interfere with those of another satellite network, or intra-satellite, which results when transmissions to or from one earth station interfere with those of another earth station operating on the same or an adjacent transponder on the same satellite.

A. Space Station Technical Standards

6. Since the early days of the domestic satellite industry, interference problems have always been resolved by cooperation between satellite operators. We expect that such cooperation will continue. However, we also believe that the limited number of technical standards we adopt here are needed to assist operators in technical planning and to minimize interference potential between satellites.

1. Telemetry, Tracking and Telecommand

7. A satellite system's telemetry, tracking and telecommand (TT&C) function is used to receive status transmissions from the satellite, track the satellite's movements and send command transmissions to the satellite. In the NPRM, in § 25.202(h), we proposed that the TT&C functions be conducted at the edges of the allocated 4/6 and 12/14 GHz fixed satellite service band(s).[11] This was intended, in part, to keep open the option of implementing a 12/14 GHz standard transponder plan in the future. We also proposed that satellites be designed to transmit and receive TT&C transmissions in both polarization senses. This was intended to add flexibility to our capability to assign orbital locations in a manner that best serves the public interest. Finally, we proposed that frequencies, polarization and coding be selected to minimize interference.

8. There is general support for TT&C functions being conducted at the edges of the allocated bands and little comment on the frequency, polarization and coding selection issue. We therefore adopt these portions of the rule.

9. Several operators, however, oppose a dual polarization requirement.[12] They argue that such a requirement would not reduce potential interference or add flexibility in assigning satellites. We are persuaded by the commenters and will not implement the TT&C dual polarization requirement at this time. Unlike communication transmissions, TT&C transmissions are relatively homogeneous within the satellite environment. Most, if not all, satellite licensees operate similar TT&C transmission packages. This allows for easier inter-satellite interference coordination. Also, earth station antennas used for TT&C are relatively large compared to the earth station antennas used for general communications. This further reduces the potential for harmful interference between TT&C transmissions on adjacent satellites. Additionally, because TT&C functions use their satellite systems' respective communication frequency bands (4/6 GHz and 12/14 GHz bands) rather than a com-

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[4] A list of all commenters and reply commenters is attached hereto as Appendix A. The full names and the abbreviated names of all commenters are included. In this order, we refer to individual commenters by their abbreviated names.

[5] *See* First Report, *infra* note 7.

[6] *See, e.g.,* Comments of CONUS with respect to the effect that regulation of transportable earth stations would have on satellite newsgathering.

[7] First Report and Order in the Matter of Amendment of Part 25 of the Commission's Rules and Regulations to Reduce Alien Carrier Interference Between Fixed-Satellites at Reduced Orbital Spacings and to Revise Application Processing Procedures for Satellite Communications Services, 6 FCC Rcd 2806 (1991) (First Report).

[8] All comments and replies were considered. In our discussion of the proposed rules, however, we highlight those comments representative of particular arguments or positions.

[9] Licensing of Space Stations in the Domestic Fixed-Satellite Service, 54 Rad. Reg. 2d (P&F) 577 (1983) (*Reduced Orbital Spacing).*

[10] 47 C.F.R. §§ 21.100(d), 21.706(c) and (d), 25.203 and 25.252 - 25.256.

[11] This consists of 500 MHz in both the uplink and downlink directions.

[12] *See* comments of AT&T, RCA (now GE Americom) and HBO.

mon TT&C frequency band, there is no potential for interference between co-located 4/6 GHz and 12/14 GHz satellites. Finally, TT&C functions are generally placed at the edges of the allocated bands. The 4/6 GHz frequency band analog video carrier center frequency placement standard we also adopt today[13] would automatically place the TT&C functions at the appropriate end.[14] Thus, dual polarization for TT&C would not significantly reduce interference potential, and consequently would not add to our ability to reassign orbital locations. Therefore, we adopt § 25.202(h) without the dual polarization requirement.[15]

2. Polarization Standards

10. Sections 25.210(a)(1) - (3) respectively proposed to require all domestic space stations to 1) use orthogonal linear polarization with one of the planes defined by the equatorial plane, 2) be designed so that the polarization sense of uplink transmissions is opposite to that of downlink transmissions and 3) be capable of switching polarization sense upon ground command. The proposed rules are intended to give the Commission flexibility in making orbital assignments and to minimize interference potential in the orbital arc. The rule requiring an onboard polarization switch is the most controversial;[16] the other two sections, §§ 25.210(a)(1) and (2), are adopted with minor editorial changes.[17]

11. Although the Commission has avoided unnecessary disruptions and relocations of U.S. domestic satellites, we have stated that orbital locations are not assigned permanently and are subject to change upon thirty days notice.[18] This flexibility is necessary to allow us to implement international agreements and domestic policies that may require the relocation of in-orbit satellites or the reassignment of satellites under construction.[19] At 4/6 GHz, adjacent satellites must operate with opposing polarization senses if harmful interference is to be avoided. The U.S. assignment plan at 4/6 GHz has been designed accordingly. Consequently, by maintaining the capability of changing the polarization sense of a 4/6 GHz band satellite from the ground, the Commission maintains its flexibility in assigning and reassigning satellites in the orbital arc. While the in-orbit polarization switch may offer "noservice improvement to the user," or may fail in orbit,[20] as some commenters assert, it will facilitate the development of a new orbital assignment scheme and will minimize service disruptions and interference problems when reassignments are necessary. Finally, while several commenters argue that the addition of the in-orbit switch would decrease performance and increase costs significantly, they provide no convincing evidence to support these claims. We believe that any degradation in performance should be insignificant and have not been presented with any cost estimates. We conclude, on balance, that the benefits of maintaining flexibility in assigning satellites and the consequent benefits in providing service to the public far outweigh the speculative costs to the operators.[21] Consequently, we adopt § 25.210(a)(3) with respect to 4/6 GHz geostationary satellite operations.[22]

3. Ground Commandable Saturation Flux Density

12. The Commission proposed in § 25.210(a)(4)[23] to require that all U.S. space stations be capable of changing transponder saturation flux densities by ground command in 2 dB steps over a total range of 12 dB. Maintaining this capability allows operators to equalize the uplink power levels between carriers accessing adjacent transponders within the same satellite. This can be used to assist in adjacent satellite coordination by adjusting the sensitivity of the satellite to interference.

13. While supporting this concept in general, commenters differ as to the appropriate approach to saturation flux density changes. The commenters' concern is that a mandated increment over a pre-determined range will "unreasonably restrict the flexibility of satellite builders, operators, and users."[24] They argue that certain satellite designs and applications may require different incremental steps and ranges, and consequently urge the Commission to specify minimum increments and ranges only, leaving space station operators free to implement alternative configurations consistent with those minimums.

14. We recognize that although 2 dB steps may be desirable, somewhat larger step sizes may serve just as well and will provide the operators with more flexiblity. We also recognize that the total range could be wider than 12 dB, particularly for 12/14 GHz band applications. We agree that we can specify a minimum capability rather than imposing a rigid gain step over a specific range and still

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[13] *See* paras. 26-28, *infra*.

[14] Although no similar plan is being adopted for 12/14 GHz frequency band operations, operators should be able to coordinate their TT&C functions based on the transponder configurations of their own and adjacent satellites.

[15] In the NPRM, we proposed to revise certain subsections of § 25.203, which pertain to a licensee's choice of sites and frequencies. Other than AT&T's supporting comments, little comment was received and we adopt the proposed rules.

[16] For supporting comments, *see* Comments of HBO, U.S. Satellite, Scientific-Atlanta, GE Americom, and M/A Com. For opposing comments, *see* Comments of GTE Spacenet, AT&T, Contel ASC, NCTA and Hughes.

[17] For supporting comments, *see, e.g.*, AT&T Comments at 6-7; GTE Spacenet Comments at 18-19; GE Americom Comments at 2; Contel ASC Comments at 1-2; and HBO Comments.

[18] *See, e.g.*, Hughes Communications Galaxy, Inc., 3 FCC Rcd 6989 (1988) at para. 23.

[19] *See, e.g.*, 1988 Trilateral Arrangement Regarding the use of the Geostationary Orbit reached by the U.S., Canada and Mexico, *Public Notice*, Mimeo No. 4406 (September 2, 1988); *Reduced Orbital Spacing, supra* note 9.

[20] The probability of failure of the polarization switch will be no greater than any other satellite mechanical component. As with any other component, the probability can be reduced with redundancy.

[21] Because the polarization sense is not a factor in making orbital assignments at 12/14 GHz, we will not require 12/14 GHz operators to install in-orbit polarization switches.

[22] This rule will apply to all satellite systems authorized after the effective date. It will not apply to satellites already authorized and under construction.

[23] Because § 25.21(a) applies to 4/6 GHz satellites only, and the proposed saturation flux density requirement applies to all fixed-satellites regardless of frequency band, we redesignate proposed § 25.210(a)(4) as § 25.210(b) to avoid confusion. Consequently, we also redesignate proposed § 25.210(b) - § 25.210(i) as § 25.210(c) - § 25.210(j), respectively.

[24] *See* Comments of HBO at 19. *See also* Comments of GTE Spacenet.

satisfy our objective. Consequently, we will allow operators to use step sizes up to 4 dB in any desired range provided that there are at least three steps in the configuration.[25]

4. Full Frequency Re-use

15. In § 25.210(d),[26] we proposed to specify the minimum equivalent capacity standards domestic satellite operators must match to be in compliance with our existing full frequency re-use requirement.[27] Specifically, the Commission proposed that in the 4/6 GHz frequency band, space stations would provide the same transmission capacity between earth stations as a satellite with 24 transponders with 36 MHz bandwidth per transponder and 8 watt solid state amplifiers. At 12/14 GHz, space stations would provide the same transmission capacity between earth stations as a satellite with 19 transponders with 48 MHz bandwidth per transponder and 20 watt amplifiers. In § 25.210(e), we proposed to specify the minimum equivalent capacity standards for international satellite operators.

16. The commenters support the concept of full frequency re-use but differ as to how it should be measured. The opposition focuses on the form of amplifer used in the calculation. For example, Western Union and Hughes oppose the reference to solid state amplifiers, citing that the travelling wave tube amplifier (TWTA) is still viable and can provide equivalent capacity. Significantly, there was no opposition to proposed § 25.210(e) which did not specify particular amplifiers.

17. The Commission's objective in proposing these rules was to codify existing policy regarding full frequency re-use. We believed that full frequency re-use could be obtained only through polarization isolation in the domestic environment and polarization and spatial isolations in the separate international satellite environment. However, technical developments have made it possible to achieve full frequency re-use using satellite design and components not provided for in our proposed rules. For example, since the NPRM was issued, we authorized AT&T to operate 120 watt 12/14 GHz and 20 watt 4/6 GHz transponders and authorized Hughes to operate 50 watt 12/14 GHz and 16 watt 4/6 GHz transponders.[28] We expect that these kinds of development will continue. Consequently, we will not specify a specific type of space station transmitter (i.e., solid state or TWTA) or power level in the rules. Rather, we will require satellite operators to use full frequency re-use using state of the art equipment and techniques and adopt §§ 25.210(d) and (e) with this modification.[29]

5. Cross-Polarization Isolation

18. The space station antenna polarization isolation requirement proposed in § 25.210(g) requires all space station antennas to be designed such that the ratio of the antenna on-axis co-polar gain to the cross-polar gain in the assigned frequency from the same spacecraft be at least 30 dB within its primary coverage area. Co-frequency signals transmitted from adjacent satellites of opposite polarizations can be coordinated more easily than co-frequency transmissions of the same polarization. The proposed rule codifies current industry practice, is supported, and therefore is adopted.

6. Satellite Station-keeping

19. Proposed § 25.210(h) requires all U.S. space stations operated in the geostationary satellite orbit to be designed with the capability of maintaining their assigned orbital longitude within a 0.05^0 tolerance. Further, the rule proposes that all space stations be maintained at their assigned orbital longitude at the longitudinal tolerance specified by the Commission. In most cases, the required station-keeping tolerance will be 0.05^0 but it is conceivable that alternative tolerances may be accepted in limited situations with agreement from all parties involved. Finally, the rule reserves the Commission's authority to assign orbital longitudes offset by 0.05^0 or some multiple thereof from the nominal orbital location specified in the station authorizations. We noted in the NPRM that this authority might be particularly useful with co-located satellites of different frequency bands, e.g., a 4/6 GHz and a 12/14 GHz satellite. This rule section codifies established Commission policy and industry practice, is supported by the commenters, and therefore is adopted.[30]

7. Satellite Antenna Measurement

20. In order to ensure that the required cross-polarization isolation is achieved, proposed § 25.210(i) requires space station antenna measurements of both co-polarized and cross-polarized performance to be made on all antennas employed by space stations. These measurements must be made within the primary coverage area to facilitate coordination with domestic satellite licensees and outside the primary coverage area to facilitate international frequency coordination.[31] The proposed rule also requires that the results of such measurements be submitted to the Commission for review within 30 days after preliminary in-orbit testing is completed. Most satellite operators support this

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[25] For example, licensees can use 3 dB steps over a range of 15 dB, 4 dB steps over a 12 dB range, or, as we proposed, 2 dB steps over a 12 dB range.

[26] Proposed § 25.210(c), *inter alia*, provides that all space stations shall derive the maximum capacity feasible from the assigned orbital location and shall employ full frequency re-use. This rule met with little comment. We adopt it as proposed.

[27] *See* 47 C.F.R. § 25.391(a); *Reduced Orbital Spacing*, note 9 *supra*.

[28] *See* American Telephone and Telegraph Company, 5 FCC Rcd 1184 (1990) and Hughes Communications Galaxy, Inc., 5 FCC Rcd 3423 (1990).

[29] Proposed section 25.210(f), which describes the criteria by which exceptions are made with regard to § 25.210(e), will also be adopted.

[30] SOUTC urges the Commission to require that all 4/6 GHz satellites be positioned 0.05^0 east of their assigned orbital locations and all 12/14 GHz satellites be positioned 0.05^0 west of their assigned orbital locations. SOUTC also recommends that the Commission allow satellites to be maintained within 0.1^0 of their assigned orbital position if agreement is reached with co-located satellite operators and such agreement is made a matter of record with the Commission. Although we will not add the language SOUTC suggests, there is nothing in § 25.210(h) that precludes the Commission from approving, on a case-by-case basis, the station-keeping scenario SOUTC describes.

[31] For international coordination purposes, the presentation of graphical data shall conform with the format specified by Appendices 3 and 4 to the ITU Radio Regulations.

rule section, recognizing that it is necessary to the coordination process.[32] Therefore, we adopt this rule with minor editorial changes.

8. Operator Reports

21. A record of the active inventory of satellite transponders is useful in assigning orbital locations and in resolving interference disputes. Proposed §§ 25.210(j)(1) - (4) would require all space station operators to file semi-annual reports with the Commission containing status descriptions of satellite construction and launch dates, listings of non-scheduled outages for more than thirty minutes, transponder utilization descriptions and identifications of non-performing transponders, respectively. The proposed rule section essentially codifies a standard condition in all space station licenses.[33]

22. There is no significant opposition to this reporting requirement with respect to the status of space station implementation, outages, and non-performing transponders. However, several operators do oppose proposed § 25.210(i)(3) regarding the submission of transponder utilization reports.[34] They state that submission of these reports is unduly burdensome and that much of the information requested, especially detailed data on individual carriers, is proprietary and not useful in resolving interference problems. This position is advanced despite the fact that the submission of this data is required now.

23. We agree that § 25.210(j)(3) can be somewhat relaxed. Although the Commission needs an accurate record of both interference occurrences and the general status of transponders, we will limit our information collection to the minimum necessary to discharge our responsibility to manage the U.S. geostationary orbit-spectrum resource. Specifically, we modify § 25.210(j)(3) to require transponder information instead of detailed r.f. carrier information. This modification should satisfy the concerns of those licensees who argue that detailed carrier information is proprietary and reduces the information required to be submitted in the semi-annual reports. Therefore, we will adopt all sub-sections of § 25.210(j) with the modifications described for § 25.210(j)(3).

B. Video and SCPC Transmissions

24. The most severe inter-satellite interference problem documented in both uplink and downlink transmissions is interference from analog video transmissions[35] into narrowband signals such as single channel per carrier (SCPC) transmissions or very small aperture terminal (VSAT) transmissions. This is because narrowband carriers, which have low spectral density, are sensitive to interference from transmissions with high spectral density components such as TV/FM carriers. Under conditions where the video carrier is not modulated, analog video transmissions can concentrate all or most of their transmitted power into a very narrow bandwidth while other transmissions tend to spread the power evenly across the transponder. Because these video signals can cause harmful interference to lower power narrowband signals, SCPC and VSAT transmissions must be kept separated from the very high power spectral density analog video transmissions which occur near the r.f. carrier center frequency. We recognize that the satellite industry is employing its own solution in both the 4/6 and 12/14 GHz bands. At 4/6 GHz, because of uniform transponder bandwidths, television carriers are placed at regular intervals within the transponder and narrowband transmissions such as SCPC avoid the television carriers' center frequencies. At 12/14 GHz, potential interference problems have been resolved in the coordination process.[36]

25. We adopt an analog video carrier center frequency placement standard, detailed below, which is designed to give the satellite operator or system coordinator clear information as to where television carriers are located within any 4/6 GHz transponder. At 12/14 GHz, we will continue to rely on the cooperation of the parties in the coordination process. We also adopt other Advisory Committee recommendations that can be used as coordination tools; specifically energy dispersal standards and carrier identification and interference reporting requirements.

1. Analog Video Carrier Center Frequency Placement Standard

26. In the NPRM, we proposed that analog television transmissions in the 4/6 GHz band be centered on frequencies F = 3700 + 20N MHz (downlink) / 5925 + 20N MHz (uplink), where N = 1 to 24, § 25.211(a).[37] We will implement this standard for the reasons below, despite the opposition or expressed concern from several commenters.

27. Several parties argue that the downlink analog video carrier center frequency standard contemplates only one analog video signal per transponder, thus limiting the use of two analog video signals per transponder or a mix of other video and non-video traffic through each transponder.[38] Although we agree that the analog video carrier center frequency standard is based on the concept of one analog video carrier per transponder, we note that Western Union and GE Americom have proposed workable 4/6 GHz band half transponder analog video channelization

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[32] *See* Comments of MCI and AT&T. *Cf.* Comments of HBO stating that the rule is vague. In response to HBO's comments, we note that the proposed § 25.210(i) allows the Commission flexibility in either requiring measurements derived from test range or in-orbit data. Further, in those instances where measured data is not readily available (e.g., applicants for new satellite systems), the Commission may specify alternatives to measured data that may be substituted until actual antenna measurements can be made.

[33] *See Reduced Orbital Spacing*, note 9 *supra* at paragraph 92.

[34] *See, e.g.*, Comments of Alascom, GTE Spacenet, and HBO.

[35] Analog video describes a wide array of actual video carriers including the most prevalently used, TV/FM. We use the two terms interchangeably.

[36] Transponder bandwidths and configurations are relatively uniform in the 4/6 GHz band. This is conducive to an analog video carrier center frequency placement standard. Satellite operators in the 12/14 GHz band operate in an environment not conducive to such a plan, with a variety of existing and planned transponder bandwidths (e.g., 27-, 36-, 43-, 54-, and 72 MHz).

[37] No protection will be afforded for narrowband carriers located at frequencies within the band "F +/- 1 MHz", not "F + 1 MHz" as was printed incorrectly in proposed § 25.212(b) where "F" is the center frequency of the television carrier.

[38] *See, e.g.*, Comments of AT&T, NCTA, Ameritech, HBO, and GTE Spacenet.

plans that would handle two analog video signals per transponder.[39] Thus, it is possible for half transponder TV to be accommodated by our analog video carrier standard.

28. The analog video carrier center frequency standard is needed to facilitate coordination. First, the terrestrial frequency plan for the band is off-set exactly by 10 MHz from the analog video carrier standard.[40] Failing to adopt a standard for satellite transmissions would create additional coordination difficulty between earth stations and terrestrial fixed stations. Second, the standard is consistent with the existing industry implementation plan for single analog video per transponder in the western arc of the U.S. geostationary satellite orbit.[41] Finally, the standard 36 MHz 4/6 GHz transponders can support up to ten compressed digital video carriers.[42] These compressed carriers are not high definition television (HDTV) quality signals, but are comparable to existing NTSC quality signals. Without a center frequency standard for analog video carriers, coordination of these transmissions could be exceedingly difficult. Consequently, we adopt § 25.211(a) as proposed.[43]

2. Energy Dispersal

29. Energy dispersal is used by satellite operators to provide interference protection to terrestrial services in the downlink 4 GHz band.[44] An energy dispersal signal is a modulation signal used to spread the carrier power throughout the peak-to-peak bandwidth. By using this technique, the concentration of power can be dramatically reduced in a referenced bandwidth.[45] In § 25.211(b), we proposed that all video transmissions contain a minimum 1.6 MHz peak-to-peak bandwidth energy dispersal signal (EDS).[46]

30. Some commenters urge the Commission not to implement a rigid energy dispersal rule for the 12/14 GHz band since 12/14 GHz band satellites do not share terrestrial frequencies on a co-equal basis in the United States and neighboring countries.[47] In contrast, these commenters support an energy dispersal standard for 4/6 GHz band satellites, but argue that the proposed minimum 1.6 MHz peak-to-peak dispersal should be permitted to fluctuate depending on satellite power so long as existing limits on 4 GHz band power flux density are maintained.[48]

31. We agree that since there is no primary domestic terrestrial service allocation in the downlink portion of the 12/14 GHz band (11.7 - 12.2 GHz), there is no need to impose an energy dispersal requirement on domestic 12/14 GHz operations. Further, at 12/14 GHz, it is easier to coordinate SCPC and TV/FM without energy dispersal than with energy dispersal.[49] However, if 12/14 GHz operators choose not to use energy dispersal, they must continue to specify the center frequencies of all their analog television carriers during coordination.[50]

32. With respect to 4/6 GHz, we believe that the bandwidth of the energy dispersal signal is best determined by the satellite operator, provided that the 24/6 GHz band satellite downlink emission is within the mandatory PFD limit.[51] In the NPRM, we proposed a minimum energy dispersal bandwidth of 1.6 MHz based on our proposed rule requiring full frequency re-use. Because we have modified that rule and will not mandate a specific method of achieving full frequency re-use,[52] there is no longer a reason to require a minimum energy dispersal bandwidth of 1.6 MHz. Therefore, although we will require 4/6 GHz satellite operators to use energy dispersal, we will not mandate a specific minimum bandwidth. Rather, operators may use any dispersal amount necessary for operations as long as all PFD limits are met.[53]

3. Initial Analog Video Test Transmission Procedures

33. In § 25.211(c), we proposed that all video transmissions be preceded by an analog video test transmission at least 10 dB below the normal operating level. Further, the operator would not be allowed to increase power until notification is received from the satellite network control center that the frequency and polarization alignment are satisfactory pursuant to the procedures specified in § 25.272. This procedure would prevent unintended transponder illuminations from analog video uplinks at power levels that might cause harmful interference.

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[39] Other commenters including Alascom supported the analog video carrier center frequency standard without proposing half transponder TV standards.

[40] *See* CCIR Recommendation 635, Terrestrial Radio Frequency Plan for the band 3700 - 4200 MHz.

[41] *See* Report and Order in the Matter of C-Band Satellite Orbital Spacing Policies to Increase Satellite Video Service to the Home, 7 FCC Rcd 456 (1992).

[42] *See* Via Satellite, Compressed Video by Karen JP Howes at page 36.

[43] With the adoption of § 25.211(a), we also adopt proposed § 25.212 which requires that interference objectives be based on nominal operating conditions with the objective of minimizing orbital separations between satellites. Also, § 25.212 proposed that narrowband emissions (less than 2 MHz in bandwidth) receive no interference protection from wider bandwidth transmissions if the r.f. carrier frequency of the narrowband signal is within +/- 1 MHz of one of the frequencies specified in § 25.211(a). We adopt proposed § 25.212 for the same reasons we are adopting § 25.211(a).

[44] In the 4 GHz band, fixed satellite services (FSS) and terrestrial fixed services are allocated on a co-primary basis. In order for those two services to share spectrum and geographic location, high power carriers such as TV/FM carriers must be modulated by an energy dispersal signal. This is necessary so that the high power carriers' power flux density (PFD) limits at the earth's surface are met.

[45] In the 4/6 GHz band, for example, the energy dispersal signal is generally in the range between 1 MHz and 4 MHz for TV/FM carriers. This reduces the power concentration in a 4 KHz reference bandwidth by 250 and 1000 times, respectively.

[46] No specific frequency band was specified in the proposed rule.

[47] *See, e.g.*, Comments of Scientific-Atlanta, HBO, GTE Spacenet and MCI.

[48] *See* Reply Comments of HBO.

[49] CCIR Recommendation 524, footnote no. 13.

[50] Energy dispersal will also be required for those services operating in the bands denoted in §§ 25.208(b) and (c).

[51] 47 C.F.R. § 25.208.

[52] *See* § 25.210. *See also* discussion at para. 17, *supra*.

[53] Section 25.211(b) also prohibits the transmission of transponder saturating unmodulated carriers except to determine

34. Many commenters support the proposed video test transmission uplink procedures.[54] Those opposing these procedures state that pre-transmission tests are unnecessary where the video earth stations remain stationary between transmissions.[55]

35. We agree, in part, with the opposing commenters. The assumption made by the opponents is that a stationary earth station would access the same transponder on the same satellite at the same polarization for each subsequent transmission. Consequently, the alignment confirmed before the first full power transmission would still be in place for subsequent transmissions. We see no need to require additional tests when all earth station parameters remain exactly the same as the initial successful test transmission. However, if operators switch satellites, transponders or polarizations, even in a "stationary" position, the parameter alignment can also change. This will require a new test. The set-up procedure proposed takes minimal time, but could yield substantial results in reducing inadvertent interference cases. Therefore, we will adopt § 25.211(c) as modified above.

4. Transmitter Identification

36. In § 25.211(d), we proposed that the operator be required to display the identity of the licensee and the operator's telephone number during all video test transmissions. Since the NPRM was released, the Commission has adopted § 25.308, Automatic Transmitter Identification System (ATIS).[56] This rule addresses the same concerns as our proposed rule, and therefore there is no need to adopt § 25.211(d).

C. Earth Station Technical Standards

37. In *Reduced Orbital Spacing*, the Commission stressed that in order for two degree orbital spacing to work, especially in the 4/6 GHz band, a more stringent earth station antenna gain requirement for sidelobes in the region of 1^0 to 10^0 was necessary. Consequently, in that proceeding, the Commission adopted Section 25.209, which contains a detailed antenna standard.[57] Two years later, the Commission established an Advisory Committee to make recommendations as to how § 25.209 could best be implemented.[58] In the NPRM of this proceeding, we proposed to codify the Advisory Committee recommendations regarding manufacturer qualification tests and on-site verifications to be performed on antenna equipment. We also proposed modifications to Section 25.209, which would give greater definition to sidelobe and cross-polarization performance requirements. With some minor modification, we adopt the earth station technical rules essentially as proposed.[59]

1. Antenna Performance Standard

38. The antenna performance standard adopted in 1983 in *Reduced Orbital Spacing*, §§ 25.209(a) and (b), required that earth station antennas meet specific numerical standards for co-polarized and cross-polarized discrimination levels. In 1985, § 25.209(f) was added, which provided that a previously licensed non-conforming earth station facility could continue to operate if the licensee could demonstrate that use of the non-conforming antenna would not cause unacceptable interference.[60] The date by which non-conforming antennas were required to come into compliance with the rule was later extended until after the Advisory Committee's recommendations were reviewed and this rulemaking completed.[61]

39. The antenna performance standard contained in § 25.209 has been an industry standard for many years. The only proposed changes involve sidelobe requirements and the inclusion of all earth station antennas in the fixed-satellite service. We also proposed to add language clarifying our policy regarding the performance shortcomings of small antennas, especially those as small as 1.2 meters in diameter operating in the 12/14 GHz band. We routinely authorize 1.2 meter antennas in the VSAT service despite their failure to meet § 25.209 between 1^0 and 1.25^0 off axis angle.[62] Nevertheless, these antennas must comply with the standard for off-axis angles greater than 1.25^0. The commenters generally support the changes to § 25.209. We adopt proposed § 25.209 with minor editorial changes.[63] In this regard, we amend Section 25.209(d) to require operators of non-conforming earth stations to bring their station operations into conformance with the adopted rule within one year after publication in the Federal Register. All applications filed after the rule's effective date must demonstrate compliance with the rule.

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transponder characteristics. This is established Commission policy and generated little comment. We will adopt that requirement as proposed.

[54] In fact, CONUS suggests that the initial threshold could be lower. We believe the proposed maximum threshold of 10 dB below normal operating levels is sufficient to prevent many of the unintended illuminations that may occur.

[55] *See* Comments of Group W, NBC and M/A Com.

[56] For complete discussion of this proceeding, *see* Further Report and Order in the Matter of An Automatic Transmitter Identification System for Radio Transmitting Equipment, Gen. Docket No. 86-337, 55 F.R. 21551 (May 25, 1990).

[57] For a discussion, *see* Reduced Orbital Spacing, *supra* note 9, at paras. 93 - 101.

[58] Establishment of an Advisory Committee on Implementation of Reduced Orbital Spacing Between Domestic Fixed-Satellites, FCC 84-488 (January 15, 1985).

[59] In the First Report, *supra* note 7, the Commission required all licensees to file certification of commencement of operation, § 25.133(b). The licensee is required to certify, among other things, that the facility as authorized has been completed and is operational and that each antenna facility has been tested and is within 2 dB of the pattern specified at § 25.209. The comments of companies such as Scientific Atlanta regarding the 2 dB tolerance were considered in the First Report at paragraph 21.

[60] 47 C.F.R. § 25.209(f). Licensing of Space Stations in the Domestic Fixed-Satellite Service, 48 Fed. Reg. 40233 (September 6, 1983), *recon.*, 99 FCC 2d 737 (1985).

[61] Compliance of Earth Stations Initially Authorized Before February 15, 1985 with Section 25.209 of the Commission's Rules, 1 FCC Rcd 665 (Com.Car.Bur. 1986).

[62] Although these antennas fail to meet § 25.209 at 1.0^0 or 1.25^0 off-axis, well engineered antennas generally meet § 25.209 at 2.0^0 off-axis. *See* Declaratory Order in the Matter of Routine Licensing of Large Networks of Small Antenna Earth Stations Operating in the 12/14 GHz Frequency Bands, 51 Fed. Reg. 15067 (April 22, 1986) (hereinafter "VSAT Order") at paragraphs 18 and 21.

[63] One such change is the correcting of the first sentence in subparagraph § 25.209(b) from "[T]he off-axis cross-polarization isolation..." to "[T]he off-axis cross-polarization antenna gain envelope..." *See* comments of Scientific Atlanta.

2. Manufacturers' Tests

40. In § 25.132(a), we proposed that all transmit earth station applications be accompanied by a certificate from the manufacturer demonstrating that each antenna cited in the application complies with the performance standards set forth in § 25.209. Further, we proposed that the licensee must be prepared to demonstrate the measurements to the Commission on request in the course of an investigation of any interference problem. Section 25.132(b) proposed the specific test to be used to demonstrate compliance.[64] The proposed measurements are to be made on a production antenna performed on a calibrated antenna range. We proposed that manufacturers conduct co-polarized patterns for each polarization, cross-polarization and main beam gain measurements.

41. The intent of the manufacturers' test requirement is to demonstrate that the equipment complies with the performance standards in § 25.209. The commenters support the rule.[65] GTE Spacenet suggests, however, that in order for the tests to be meaningful, they must be conducted for all planned installation configurations. This appears reasonable in light of the fact that identical antennas can operate differently when fitted with different feeds or polarization rotation devices. We will therefore require that tests be made on representative equipment in representative configurations. With that modification, we adopt § 25.132(a) and (b).

3. On-Site Verification Measurement Procedures

42. The tests described in § 25.132(b) are normally performed at the manufacturer's facility. However, for those antennas that are very large and only assembled on-site, we proposed in § 25.132(c) to allow, as an option, the use of on-site measurements for performance compliance verification or product qualification. We proposed that if on-site data is to be used for product qualification, the tests, frequencies and number of patterns should follow, where possible, the recommendations in § 25.132(b), and the test data should be submitted in the same manner as described in § 25.132(a).[66]

43. Proposed § 25.132(d) describes the on-site verification measurements that must be conducted for each new or modified transmitting antenna over 3 meters in diameter that is tested on-site.[67] It provides that the measurements must be completed at one frequency on an available transponder in each frequency band of interest and submitted to the Commission. Transmit patterns are to be measured with the aid of a cooperating receiving earth station in coordination with the satellite system control center.

44. In § 25.132(f), we proposed to exempt antennas less than 3 meters in diameter that are at a fixed site from the on-site verification requirements provided that a detailed technical showing is made that confirms proper installation, pointing procedures, and polarization alignment and manufacturing quality control. The proposed showings also include a plan for periodic testing and field installation procedures and precautions.[68] Finally, § 25.132(g) proposed that test records be maintained at the antenna site or the earth station operator's control center and be available for inspection.

45. For the most part, commenters support an on-site § 25.209 verification alternative to the manufacturer's test. Scientific Atlanta, however, notes that the Advisory Committee, in its attempt to address the unique problem of antennas with simple drive systems (manual or non-motorized), recommended that for those antenna mounts which do not have the capability of a smooth and continuous movement, on-site measurements other than those described in § 25.132(d) or other factory tests may be substituted for acceptance criteria. We find merit in this proposal and will allow simple (i.e., manual) drive antenna systems to use the same acceptance criteria used by antennas less than 3 meters in diameter.[69] We will require that a plan for periodic testing and field installation procedures and precautions be included with the showing.

46. There is some disagreement regarding whether fixed antennas that are 3 meters or less should be exempt from the on-site measurement requirements of § 25.132(c). Arent Fox argues that the alternative showings required in § 25.132(f) for fixed antennas that are 3 meters or less appear more burdensome than the on-site measurement requirements of §§ 25.132(c) and (d). Although we do not believe requiring 3 meter antenna operators to submit alternative technical showings to be more burdensome, the § 25.132(c) measurements are not easily applied to 3 meter antenna. However, if operators choose to provide the § 25.132(c) showing instead of the alternative showing in § 25.132(f) or if they insist that the manufacturer conduct the verification tests, they are free to do so. In light of the foregoing, we adopt § 25.132 with the modifications described above.

47. Finally, in the NPRM, we requested comment on whether to allow measurements in the receive band to be used as a substitute for transmit band measurements and how such verification tests in the transmit band could be accommodated under an inter-system coordination procedure. We asked this based on the assumption that transmit band measurements may be impractical to perform in certain circumstances. Commenters were nearly unanimous in the view that receive band patterns should not be substituted for transmit band measurements.[70] The commenters state that although receive patterns may be indicative as to transmit patterns, extrapolations from receive patterns can often produce inaccurate predictions of transmit patterns. In light of the comments received, we will not add a rule on this issue.

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[64] For the detailed description of the test *see* Appendix C, § 25.132(b).

[65] *See, e.g.,* Comments of Scientific Atlanta and Andrew, both earth station manufacturers.

[66] Section 25.132(e) proposes that the operator must submit to the Commission a certification that the § 25.132(c) tests have been satisfactorily performed in the notification that construction of the facilities has been completed as required by § 25.133. (In the NPRM, proposed § 25.132(e) erroneously cites § 25.134 instead of § 25.133.

[67] For the detailed description of the test *see*, Appendix C, § 25.132(d).

[68] As a practical matter, however, antennas less than 3 meters will probably be tested by the manufacturer.

[69] *See* 25.132(f).

[70] *See* Comments of Scientific-Atlanta and GTE Spacenet in opposition and AT&T in concurrence for examples.

4. Power Limits and Uplink Power Control

48. We proposed in § 25.204(d) that, in the interest of minimizing adjacent satellite interference, notwithstanding the equivalent isotropically radiated power (e.i.r.p.) and e.i.r.p. density limits specified in the station authorization, each earth station transmission was to be operated at the lowest power level that will provide the required signal quality. Commenters generally agreed with the concept but requested clarification on the term "required signal quality". To clarify, the required signal quality is that signal quality determined by the operator as the minimally acceptable to allow it to provide contractually acceptable service to its customers as indicated in the link budgets provided in the application. Of course, signal quality is subject to any constraints agreed to in coordination with adjacent satellite operators. These coordination agreements become a condition of the license pursuant to § 25.111(b). We will modify § 25.204(d) to reflect any coordination agreements with adjacent satellite operators.

49. Proposed § 25.204(e) relates to uplink power control which is used to combat fading due to precipitation and is necessary to provide uninterrupted service in the 12/14 GHz band.[71] The level of control or the amount of power increase depends on the fade depth and the percentage of service availability required. The fade depth depends on local climatic conditions; for example, Florida and locations bordering the Gulf of Mexico have higher fade levels and durations than Nevada. The proposed rule would permit 14 GHz band uplink operators, including VSAT operators, to increase their uplink e.i.r.p. and e.i.r.p. density under uplink rain fade conditions by an amount not to exceed 1 dB above the actual amount of monitored excess attenuation over clear sky propagation conditions. The proposed rule further provided that the transmitted e.i.r.p. or e.i.r.p. density shall in no case exceed the value specified in the station authorization by more than 5 dB.

50. The commenters generally support the proposed rule, although several urge the Commission to eliminate the 5 dB overall limit.[72] These commenters state that a 5 dB limit is arbitrary and too low to remedy the uplink precipitation fades they experience. We believe that with proper safeguards, we can give those operators who experience extraordinarily high uplink rain fade attenuation some relief. We will adopt a 5 dB limit for uplink power control, but will permit operators to exceed this limit provided the higher level is fully coordinated with adjacent satellite operators and the operator exceeding the limit notifies the Commission of such agreement.[73] All operators using uplink power control must be able to monitor their satellite's performance to ensure that the signal received at the satellite is no greater than that received under normal operating conditions and that the e.i.r.p. levels are returned to normal as soon as the attenuating weather pattern subsides.[74] Operators should be aware, however, that if they plan to operate in excess of the ANSI standards[75] they must file a revised radiation hazard study and an environmental assessment.[76] These operations will not be permitted until Commission authorization has been given.

D. Inter-System Coordination Procedures

51. Over the years, the Commission has received numerous comments urging that transmission "traffic" coordination by satellite operators is necessary to avoid creating co-channel, worst-case interference incidents. We draw from our institutional experience, the comments of the public, the recommendations of the Advisory Committee and the Contel ASC Petition for Rulemaking in developing these inter-system coordination procedures. The rules are intended to set forth practices and mechanisms for earth station licensees to follow that will eliminate interference caused by careless operations. Also, we wish to provide procedures to operators so that they may avoid potential interference problems before they occur. Proposed Subpart D of Part 25 provides a step-by-step notification and identification procedure for earth station and space station licensees to follow to identify the source of harmful interference and eliminate its cause. Proposed §§ 25.271 - 25.277 provide: (1) rules regarding the control of transmitting stations; (2) general inter-system coordination procedures including certain responsibilities on the licensee of the facility for its proper operation; (3) duties regarding space communications transmissions including procedures to address potential interference problems before they occur; (4) procedures to be followed in the event of a harmful interference occurrence; (5) particulars of operation including what appears on a station authorization; (6) points of communication including a description of what service area is authorized in routine cases; and (7) temporary fixed earth station operations including administrative aspects of those facilities.[77] There is general agreement on these rules and we therefore adopt them essentially as proposed.[78]

1. Authorization Before Transmission

52. In § 25.273(a)(1), we proposed that no person shall transmit to a satellite unless the specific transmission is first authorized by the satellite network control center. In paragraphs (a)(2) and (a)(3) we proposed that no person

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[71] We distinguish this procedure from the entirely different procedure required to permit high power satellite downlink transmissions for VSAT networks governed by § 25.134.

[72] *See* Comments of AT&T, Hughes Communications, Inc., Southland Corporation and Wal-Mart Stores, Inc.

[73] We will still limit operators to e.i.r.p. and e.i.r.p. density levels no more than 1 dB above the actual amount of monitored excess attenuation over clear sky propagation conditions.

[74] This procedure should ensure that adjacent satellites do not experience undue interference, while allowing the operator facing rain attenuation problems to serve its customers without disruption. If operators using uplink power control have not properly coordinated their operations and consequently interfere with adjacent operators, they will be subject to a forfeiture.

[75] "Radio Frequency Protection Guides" recommended in "American National Standard Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 300 kHz to 100 GHz," (ANSI C95.1-1982), issued by the American National Standards Institute (ANSI).

[76] *See* § 1.1307(b).

[77] Section 25.256 was also uncontroversial. It set forth guidelines for performing interference analyses for precipitation scatter modes. We adopt it as proposed.

[78] We will discuss only those rule sections that received mixed comment. In the NPRM, the designations for this Subpart were §§ 25.301 - 25.307. Since other rules were redesignated with these numbers in the First Report and Order in this proceeding, the coordination rules are redesignated §§ 25.271 - 25.277, respectively.

shall (1) conduct transmissions over a transponder unless the operator is authorized to transmit at that time by the satellite licensee or the transponder owner or lessee, if different; or (2) transmit in any manner that causes unacceptable interference to the authorized transmission of another licensee. After adoption of the NPRM in this proceeding, GTE Spacenet filed a Petition for Declaratory Ruling[79] requesting clarification of the Commission's policies regarding intentional, unauthorized earth station transmissions. The concerns expressed in GTE's petition are addressed by proposed § 25.273(a)(2) and we will therefore treat GTE Spacenet's petition as informal comments in this proceeding.[80]

53. GTE Spacenet and others stress the importance of a regulation prohibiting intentional, unauthorized transmissions. The potential for harmful interference and the financial implications of theft of service justify the rule's adoption. Licensees are cautioned that the designation "ALSAT" on earth station licenses does not grant a right to transmit to any domestic satellite without permission from the particular satellite operator.[81] Violation of this rule will subject the earth station operator to sanctions or forfeiture.

54. With respect to the general operation of § 25.273(a)(1), commenters requested clarification about the methods by which earth station licensees are to obtain authorization before transmitting. Commenters claim the rule appears to preclude earth station operators from transmitting to a satellite until each specific transmission is authorized by the satellite network control center. They argue that if they have to obtain permission using terrestrial land lines, the speed and quality of their service would be impeded because these lines may be difficult to access and may not even be available. They argue that the Commission should provide authority for transportable earth station operators to initiate communications with the satellite network control center pursuant to a prearranged set-up procedure.[82]

55. Section 25.273(a)(1) was not intended to require that the uplinker use land line telephone to obtain prior authorization from the network control center. Rather, it was intended to ensure that earth station operators do not radiate into domestic satellites haphazardly. We will not prevent earth station and space station licensees from fashioning their own uplink procedures to prevent uncoordinated uplink transmissions. We believe this clarification will satisfy the opponents of this section and therefore we adopt § 25.273(a) in its entirety.

FURTHER NOTICE OF PROPOSED RULEMAKING

A. Transportable Facilities

56. The Commission has been authorizing transportable (temporary-fixed) earth stations for over ten years.[83] Transportable earth stations operate from stationary positions but are not fixed to one particular location and can be relocated easily (e.g., a satellite newsgathering vehicle). Major problems can occur through the operation of small antenna video uplink terminals, particularly if they are used to saturate the transponder with the objective to obtain maximum downlink power. These problems can be exacerbated if the transportables are set up very quickly and are poorly aligned.[84] The Advisory Committee's recommendations were designed to ensure that each transportable earth station operates within established specification before each transmission. To accomplish this, we proposed that a pre-transmission service pattern check be performed and an annual antenna performance test be conducted (§ 25.277(f)) for these facilities.[85]

1. Transportable Testing

57. CONUS, a cooperative of 59 local television stations and television news entities in the United States and abroad, and many of its individual members filed comments opposing the proposed transportable testing requirements. CONUS states that it is the largest provider of satellite newsgathering (SNG) services to the television broadcasting community and that the imposition of the requirements would severely affect the flexibility, speed and mobility of those operations.

58. CONUS first argues that operation in the 12/14 GHz band has not been characterized by the same interference incidents as has occurred in the 4/6 GHz band. It states that the Advisory Committee failed to point out that the vast majority of interference problems were caused by the sloppy operation of large folding 4/6 GHz antennas, and not by small single piece 12/14 GHz band antennas of the type commonly employed by the satellite news gathering organizations. CONUS states that the multi-joint 4/6 GHz band antennas are subject to material stresses in transit that impair performance even if no structural degradation is noticeable to a casual visual inspection. According to CONUS, small, low mass, single piece 12/14 GHz antennas are extremely rugged, and not as subject to change of shape when in transit. CONUS claims it does not normally allow use of folding antennas in its SNG system.

59. CONUS and its members also contend that the testing of small single piece 12/14 GHz antennas prior to transmission from each new location would be time-consuming and burdensome. It states that proper measurement of the antenna receive pattern would require the transmission from a cooperating earth station of a suitable test signal. However, according to CONUS, the use of existing

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[79] This petition was supported by Hughes, GE Americom and Conus.

[80] *See* Comments of Hughes filed in response to the GTE Spacenet petition which state that adoption of our proposed rule would rectify the situation described by GTE Spacenet.

[81] The term "ALSAT" is used on earth station licenses to indicate that the facility is authorized by the Commission to communicate with all U.S. domestic fixed-satellites without having to further modify the authorization. This in no way indicates that any agreement or consent has been given by a particular satellite operator.

[82] *See* Comments of CONUS, Chronicle, Griffin Television, NBC and Post-Newsweek Stations.

[83] *See* Western Tele-Communications, Inc., Mimeo No. 3640 (released September 30, 1981).

[84] Such operation might be violative of Western Tele-Communications, Inc., *id.*, which restricts off-axis radiation levels.

[85] Section 25.277(f) is the former § 25.307(f). *See* note 78 *supra*.

on-air traffic during the periods of heaviest demand is unsuitable due to the frequency with which transportable earth stations come on and go off the air. Further, CONUS argues that if a test signal is provided from a cooperating earth station, this signal will need to be available throughout the periods of peak news traffic. This, CONUS claims, would take an entire video channel out of service precisely at the time of day when maximum satellite capacity is needed most.[86]

60. CONUS and its members also oppose the proposed annual testing requirements. They contend that this requires placing a small antenna on an antenna range on an annual basis, which will mean losing the services of the earth station for as much as two weeks. CONUS claims that the expense involved can approach, if not exceed, the cost of simply replacing the antenna annually. CONUS warns that adoption of such a rule would encourage the use of cheap "throwaway antennas" in place of well engineered transportable antennas.

61. As an alternative to § 25.277(f), CONUS recommends the following rules for small 12/14 GHz band antennas used with temporary fixed earth stations:

> a) Single piece antennas less than 3 meters in diameter intended for use on a transportable basis should be qualified by the manufacturer as a transportable antenna. Samples of these antennas should be tested for compliance periodically during the manufacturing process, and then subject to environmental tests simulating the transportable environment. These antennas would then be put back on the range to see that they are still compliant.
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> b) These antennas would be annually tested using a receive signal provided by a cooperating transmitting earth station. These tests would be conducted using more sophisticated receive test equipment in order to obtain results superior to those obtainable in a field test situation. (This approach would allow antenna test equipment to be shared by a group of users, and would allow the tests to be conducted in a no-rush, controlled manner, rather than under the pressure of field conditions). If these results indicate a variance by more than 2 dB from the manufacturer's published data, the antenna would be sent out for repair and range test, or replacement.
>
> c) Damage to the antenna that could cause a change in the shape of the reflector would be cause to fall back to the repair and range test (full tests), or replace, status. (CONUS claims its own rules require that any antenna suffering damage to the reflector must be taken out of service immediately.)
>
> d) ther damage to the antenna would be cause for replacement of the damaged parts and readjustment of those parameters such as feed centering and focal length that can successfully be done in the field. An antenna thus repaired would then go through the annual qualification procedure in (b) above.

62. These arguments are persuasive and reasonable alternatives have been suggested. In light of the foregoing, we will not adopt proposed § 25.277(f) and instead propose a new rule in Appendix D based on the CONUS alternative.[87] Pursuant to procedures set out in Section 1.415 of the Commission's rules, 47 C.F.R. § 1.415, interested parties may file comments on these proposals on or before **May 7, 1993** and reply comments on or before **June 22, 1993.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the Report and Order.

63. In accordance with provisions of Section 1.419 of the Commission's rules, 47 C.F.R. § 1.419, formal participants shall file an original and five copies of their comments and other materials. Participants wishing each Commissioner to have a personal copy of their comments should file an original and 10 copies. Members of the general public who wish to express their interest by participating informally may do so by submitting one copy. All comments are given the same consideration, regardless of the number of copies submitted. Comments and reply comments should be sent to: Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. All documents will be available for public inspection during regular business hours at the Commission's Public Reference Room at its headquarters, Room 239, 1919 M Street, N.W., Washington, D.C. For general information on how to file comments, please contact the FCC Consumer Assistance and Information Division at (202) 632-7000.

64. For purposes of this non-restricted notice and comment rulemaking proceeding, members of the public are advised the *ex parte* contacts are permitted from the time the Commission adopts a notice of proposed rulemaking until the time a public notice is issued stating that a substantive disposition of the matter is be considered at a forthcoming meeting or until a final order disposing of the matter is adopted by the Commission, which is earlier. In general, an *ex parte* presentation is any written or oral communications (other than formal written comments/pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any previously-filed written comments for the proceeding must prepare a written summary of that presentation on the day of the oral presentation. That written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has

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[86] CONUS states that due to the small antenna size, a relatively large amplitude test signal is required in order to obtain the required amplitude resolution. Other stable signals such as the satellite beacons would require expensive receivers or analyzers in order to provide the required resolution.

[87] An Initial Regulatory Flexibility Analysis of these proposed rules is contained in Appendix E.

been served, and must also state by docket number the proceeding to which it related. *See generally* 47 C.F.R. § 1.1231.

II. CONCLUSION

65. In this *Second Report and Order* we codify most of the technical rules proposed for earth station and satellite facilities contained in the NPRM, with the modifications as discussed. We will not adopt rules on annual and on-site testing of transportable earth stations. We instead propose a new rule, Section 25.277(f), to govern transportable earth station testing.

66. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose new and modified information collection requirements on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.[88]

III. ORDERING CLAUSES

67. Accordingly, IT IS ORDERED that Part 25 of the Commission's Rules and Regulations is amended as specified in Appendix C, effective 60 days after publication in the Federal Register.

68. IT IS FURTHER ORDERED that operators of nonconforming antennas are required to bring their station operations into conformance with Section 25.209 of the Commission's rules, 47 C.F.R. § 25.209, within one year after publication in the Federal Register.

69. IT IS FURTHER ORDERED that pursuant to the authority contained in Sections 4(i) and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 4(i), 303, FURTHER NOTICE OF PROPOSED RULEMAKING IS HEREBY PROVIDED to amend Section 25.277 of the Commission's rules, 47 C.F.R. § 25.277, set forth in Appendix D.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Comments Filed

Alascom, Inc. (Alascom)

American Satellite Company (Contel ASC)

American Telephone & Telegraph (AT&T)

American Uplinks, Inc. (American Uplinks)

Ameritech Operating Companies (Ameritech)

Andrew Corporation (Andrew)

Arent, Fox, Kintner, Plotkin & Kahn (Arent Fox)

Arizona Television Company (Arizona TV)

Associated Press (AP)

Association of Maximum Service Telecasters, Inc. (AMST)

BellSouth Corporation (Bell South)

CBS, Inc. (CBS)

Capital Cities/ABC, Inc. (Capital Cities)

Capitol Broadcasting Company, Inc. (Capitol Broadcasting)

Chronicle Broadcasting Company (Chronicle)

Cole, Raywid & Braverman (on behalf of Cable Television Operators) (Cole Raywid)

Communications Satellite Corporation (Comsat)

Conus Communications Company Limited Partnership (CONUS)

Cylix Communication Corporation (Cylix)

Equatorial Communication Services (Equatorial)

Federal Express Corporation (Federal Express)

Frequency Management (Frequency Management)

GTE Spacenet Corporation (GTE Spacenet)

Gannett Co., Inc. & the Radio-Television News Directors Association (Gannett)

General Electric Property Management of Colorado, Inc. (GE)

Geostar Corporation (Geostar)

Group W (Group W)

H & C Communications, Inc. (H&C)

The Hearst Corporation (Hearst)

Home Box Office, Inc. (HBO)

Hughes Aircraft Company (Hughes Aircraft)

Hughes Communications, Inc. (Hughes)

IDB Communications Group, Inc. (IDB)

Interferometrics Inc.

KSAT - TV

KUTV, Inc. & Kansas State Network, Inc. (KUTV)

Kelly Television Company (Kelly TV)

Nickolaus E. Leggett & Donald J. Schellhardt (Leggett & Schellhardt)

M/A-Com Telecommunications, Inc. (M/A Com)

MCI Communications Corporation (MCI)

McGraw-Hill Broadcasting Company, Inc. (McGraw-Hill)

John P. McNally, Griffin Television Inc. (McNally Griffin)

NSMA (National Spectrum Managers Association)

[88] The final regulatory flexibility analysis is set forth in Appendix B.

The National Association of Broadcasters (NAB)

National Broadcasting Company, Inc. (NBC)

National Cable Television Association, Inc. (NCTA)

National Public Radio (NPR)

News 12 Long Island (News 12)

Newslink, Inc. (Newslink)

Post-Newsweek Stations, Inc. (Post-Newsweek)

Public Broadcasting Service (PBS)

Pulitzer Broadcasting Company (Pulitzer)

QSI Systems, Inc. (QSI)

RCA American Communications, Inc. (RCA)

Satellite Operators and Users Technical Committee (SOUTC)

Satellite Transmission and Reception Specialist Company (STARS)

Schlumberger Technology Corporation (Schlumberger)

Scientific-Atlanta, Inc. (Scientific-Atlanta)

Sherwin-Greenburg Production, Inc. (Sherwin-Greenburg)

The Southland Corporation (Southland)

Southwestern Bell Telephone Company (Southwestern Bell)

Telecommunications Committee of the American Petroleum Institute (API)

U.S. Satellite Corporation, Inc. (US Satellite)

Viacom International, Inc. (Viacom)

WSVN/NBC (WSVN-TV)

WTVJ Television (WTVJ-TV)

WVUE-TV (WVUE-TV)

Wall Street Journal

Wal-Mart Stores, Inc. (Wal-Mart)

Western Union Telegraph Company (Western Union)

Reply Comments Filed

American Telephone & Telegraph

Ameritech Operating Co.

Associated Press

CBS, Inc.

CONUS Communications Co. Limited Partnership

Equatorial Communication Services

GTE Spacenet Corporation

Gannett Co., Inc. & Radio/Television News Directors Assoc.

Geostar Corporation

Home Box Office, Inc.

Hughes Communications, Inc.

Knight-Ridder Broadcasting, Inc. (Knight-Ridder)

Media General Broadcast Group, Inc. (Media General)

National Association of Broadcasters

Pacific Bell

RCA American Communications, Inc.

Satellite Operators & Users Technical Committee

Schlumberger Technology Corporation

Southland Corporation

Video Indiana, Inc. (Video Indiana)

Vitalink Satellite, Inc. (Vitalink)

WBNS TV, Inc. (WBNS-TV)

Wal-Mart Stores, Inc.

APPENDIX B

Regulatory Flexibility Act - Final Analysis for Rules Adopted in the Second Report and Order

Need for Rules and Objective. We have codified standing Commission technical policy, Advisory Committee recommendations and standard industry practice in an effort to promote efficiency and innovation in the allocation, licensing and use of the electromagnetic spectrum. Our objective has been to encourage the development of a competitive and innovative communications system. Finally, we have acted to promote effective and adaptive regulation for communications, while eliminating unnecessary regulations.

Issues Raised by the Public in Response to the Initial Analysis. No comments were received specifically in response to the initial Regulatory Flexibility Analysis. The bulk of the public comment in response to the initial analysis of the NPRM was addressed in the First Report and Order. We have taken into account those remaining issues raised by the public concerning the proposed technical rules. As a result of these comments we have modified our proposals as appropriate.

Alternatives that would lessen impact. We have reduced burdens whenever possible.[1] The regulatory burdens we have retained are necessary in order to carry out our duties under the Communications Act of 1934 as amended. We will continue to examine alternatives in the future with the objectives of eliminating unnecessary regulations and minimizing any significant economic impact on small entities.

[1] *See e.g.*, § 25.210(j)(3) where we relaxed the policy of requiring space station operators to submit "carrier" specific transponder utilization reports. Also, in § 25.204(e), we relaxed our policy regarding uplink power control for 12/14 GHz earth station operators.

APPENDIX C

Part 25 of the Commission's Rules and Regulations (Chapter I of Title 47 of the Code of Federal Regulations) is amended as follows:

PART 25 - SATELLITE COMMUNICATIONS

1. The authority citation for Part 25 continues to read as follows:

AUTHORITY: §§ 25.101 to 25.531 issued under Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154. Interpret or apply secs. 101-104, 76 Stat. 419-427; 47 U.S.C. 701-744.

2. A new Section 25.132 is added to read as follows:

§ 25.132 Verification of earth station antenna performance standards.

(a) All applications for transmitting earth stations in the C and Ku-bands must be accompanied by a certificate pursuant to §2.902 of this Chapter from the manufacturer of each antenna that the results of a series of radiation pattern tests performed on representative equipment in representative configurations by the manufacturer which demonstrates that the equipment complies with the performance standards set forth in § 25.209. The licensee must be prepared to demonstrate the measurements to the Commission on request in the course of an investigation of a harmful interference incident.

(b) In order to demonstrate compliance with §§ 25.209(a) and (b), the following measurements on a production antenna performed on calibrated antenna range, as a minimum, shall be made at the bottom, middle and top of each allocated frequency band and submitted to the Commission:

(1) Co-polarized patterns for each of two orthogonal senses of polarizations in two orthogonal cuts of the antenna.

(i) In the azimuth plane, plus and minus 7 degrees and plus and minus 180 degrees.

(ii) In the elevation plane, zero to forty-five degrees.

(2) Cross-polarization patterns in the E- and H- planes, plus and minus 9 degrees.

(3) Main beam gain.

The FCC envelope specified in § 25.209 shall be superimposed on each pattern. The minimum tests specified above are recognized as representative of the performance of the antenna in most planes although some increase in sidelobe levels should be expected in the spar planes and orthogonal spar planes.

(c) The tests specified in paragraph (b) of this section are normally performed at the manufacturer's facility; but for those antennas that are very large and only assembled on-site, on-site measurements may be used for product qualification data. If on-site data is to be used for qualification, the test frequencies and number of patterns should follow, where possible, the recommendations in paragraph (b) of this section, and the test data is to be submitted in the same manner as described in paragraph (a) of this section.

(d) For each new or modified transmitting antenna over 3 meters in diameter, the following on-site verification measurements must be completed at one frequency on an available transponder in each frequency band of interest and submitted to the Commission.

(1) Co-polarized patterns in the elevation plane, plus and minus 7 degrees, in the transmit band.

(2) Co-polarized patterns in the azimuth and elevation planes, plus and minus 7 degrees, in the receive band.

(3) System cross-polarization discrimination on-axis. The FCC envelope specified in § 25.209 shall be super-imposed on each pattern. The transmit patterns are to be measured with the aid of a co-operating earth station in coordination with the satellite system control center under the provisions of § 25.272.

(e) Certification that the tests required by paragraph (c) of this section have been satisfactorily performed shall be provided to the Commission in notification that construction of the facilities has been completed as required by § 25.133.

(f) Antennas less than 3 meters in diameter and antennas on simple (manual) drive mounts that are operated at a fixed site are exempt from the requirements of paragraphs (c) and (d) of this section provided that a detailed technical showing is made that confirms proper installation, pointing procedures, and polarization alignment and manufacturing quality control. These showings must also include a plan for periodic testing and field installation procedures and precautions.

(g) Records of the results of the tests required by this section must be maintained at the antenna site or the earth station operator's control center and be available for inspection.

3. In Section 25.202, a new paragraph (h) is added to read as follows:

§ 25.202 Frequencies, frequency tolerance and emission limitations

* * * * *

(h) Telemetry, tracking and telecommand functions for U.S. domestic satellite shall be conducted at either or both edges of the allocated band(s). Frequencies, polarization and coding shall be selected to minimize interference into other satellite networks and within their own satellite system.

4. In Section 25.203, paragraphs (b) and (c)(5) are revised to read as follows:

§ 25.203 Choice of sites and frequencies.

* * * * *

(b) An applicant for an earth station authorization in a frequency band shared with equal rights with terrestrial microwave services shall compute the great circle coordination distance contour(s) for the proposed station in accordance with the procedures set forth in §§ 25.251 through 25.253 and the rain scatter coordination distance contour(s) for the proposed station in accordance with the procedures set forth in § 25.254, the applicant shall submit with the application a map or maps drawn to appropriate scale and in a form suitable for reproduction indicating the location of the proposed station and these contours. These maps, together with the pertinent data on which the computation

of these contours is based, including all relevant transmitting and/or receiving parameters of the proposed station that might be useful in assessing the likelihood of interference, an appropriately scaled plot of the elevation of the local horizon as a function of azimuth, and the electrical characteristics of the earth station antenna(s), shall be submitted by the applicant in a single exhibit to the application. The coordination distance contour plot(s), horizon elevation plot, and antenna horizon gain plot(s) required by this section may also be submitted in tabular numerical format at 5^0 azimuthal increments instead of graphical format. At a minimum, this exhibit shall include the information listed in paragraph (c)(2) of this section. An earth station applicant shall also include in the application relevant technical details (both theoretical calculations and/or actual measurements) of any special techniques, such as the use of artificial site shielding, or operating procedures or restrictions at the proposed earth station which are to be employed to reduce the likelihood of interference, or of any particular characteristics of the earth station site which could have an effect on the calculation of the coordination distance.

(c) * * *

(5) The Commission may, in the course of examining any application, require the submission of additional showings, complete with pertinent data and calculations in accordance with §§ 25.251-25.256, showing that harmful interference is not likely to result from the proposed operation.

* * * * *

5. Section 25.203(e) is removed.

6. Sections 25.203(f)-(h) are redesignated as Sections 203(e)-(g), respectively.

7. Sections 25.204(d) and (e) are added to read as follows:

§ 25.204 Power Limits.

* * * * *

(d) Notwithstanding the e.i.r.p. and e.i.r.p. density limits specified in the station authorization, each earth station transmission shall be conducted at the lowest power level that will provide the required signal quality as indicated in the application and further amended by coordination agreements.

(e) For operations at frequencies above 10 GHz, earth station operators may exceed the uplink e.i.r.p. and e.i.r.p. density limits specified in the station authorization under the conditions of uplink fading due to precipitation by an amount not to exceed 1 dB above the actual amount of monitored excess attenuation over clear sky propagation conditions. The e.i.r.p. levels shall be returned to normal as soon as the attenuating weather pattern subsides. The maximum power level for power control purposes shall be coordinated between and among adjacent satellite operators.

8. Sections § 25.209 (a), (b), (c) and (d) are revised and paragraph (g) is added to read as follows:

§ 25.209 Antenna Performance Standard.

(a) The gain of any antenna to be employed in transmission from an earth station in the fixed-satellite service shall lie below the envelope defined below:

(1) In the plane of the geostationary satellite orbit as it appears at the particular earth station location:

29 - 25 $\log_{10}$ (Theta) dBi	$1^0 <= \text{Theta} <= 7^0$
+8 dBi	$7^0 < \text{Theta} <= 9.2^0$
32 - 25 $\log_{10}$ (Theta) dBi	$9.2^0 < \text{Theta} <= 48^0$
-10 dBi	$48^0 < \text{Theta} <= 180^0$

where Theta is the angle in degrees from the axis of the main lobe, and dBi refers to dB relative to an isotropic radiator. For the purposes of this section, the peak gain of an individual sidelobe may not exceed the envelope defined above for Theta between 1.0 and 7.0 degrees. For Theta greater than 7.0 degrees, the envelope may be exceeded by no more than 10% of the sidelobes, provided no individual sidelobe exceeds the gain envelope given above by more than 3 dB.

(2) In all other directions, or in the plane of the horizon including any out-of-plane potential terrestrial interference paths:

Outside the main beam, the gain of the antenna shall lie below the envelope defined by:

32 - 25 $\log_{10}$ (Theta) dBi	$1^0 <= \text{Theta} <= 48^0$
-10 dBi	$48^0 < \text{Theta} <= 180^0$

where Theta and dBi are defined above. For the purposes of this section, the envelope may be exceeded by no more than 10% of the sidelobes provided no individual sidelobe exceeds the gain envelope given above by more than 6 dB. The region of the main reflector spillover energy is to be interpreted as a single lobe and shall not exceed the envelope by more than 6 dB.

(b) The off-axis cross-polarization gain of any antenna to be employed in transmission from an earth station to a space station in the domestic fixed-satellite service shall be defined by:

19 - 25 $\log_{10}$ (Theta) dBi	$1.8^0 < \text{Theta} <= 7^0$
-2 dBi	$7^0 < \text{Theta} <= 9.2^0$

(c) Earth station antennas licensed for reception of radio transmissions from a space station in the fixed-satellite service are protected from radio interference caused by other space stations only to the degree to which harmful interference would not be expected to be caused to an earth station employing an antenna conforming to the referenced patterns defined in paragraphs (a) and (b) of this section, and protected from radio interference caused by terrestrial radio transmitters identified by the frequency coordination process only to the degree to which harmful interference would not be expected to be caused to an earth station conforming to the reference pattern defined in paragraph (a)(2) of this section.

(d) The patterns specified in paragraphs (a) and (b) of this section shall apply to all new earth station antennas initially authorized after February 15, 1985 and shall apply to all earth station antennas after **[One year after publication in the Federal Register].**

* * * * *

(g) The antenna performance standards of small antennas operating in the 12/14 GHz band with diameters as small as 1.2 meters starts at 1.25^0 instead of 1^0 as stipulated in paragraph (a) of this section.

9. A new Section 25.210 is added to read as follows:

§ 25.210 Technical requirements for space stations in the Fixed-Satellite Service.

(a) All space stations in the Fixed-Satellite Service used for domestic service in the 4/6 GHz frequency band shall:

(1) Use orthogonal linear polarization with one of the planes defined by the equatorial plane;

(2) Be designed so that the polarization sense of uplink transmissions is opposite to that of downlink transmissions on the same transponder; and

(3) 4/6 GHz band space stations shall be capable of switching polarization sense upon ground command.

(b) All space stations in the Fixed-Satellite Service shall have a minimum capability to change transponder saturation flux densities by ground command in 4 dB steps over a range of 12 dB.

(c) All space stations in the Fixed-Satellite Service shall be designed to derive the maximum capacity feasible from the assigned orbital location. In particular, space stations in the fixed satellite service are required to employ state-of-the-art full frequency re-use using both horizontal and vertical polarization.

(d) For fixed-satellite space stations providing domestic service, full frequency re-use is defined as re-use of the frequency bands by polarization discrimination in both the uplink and downlink directions using state-of-the-art equipment and techniques.

(e) For international fixed-satellite space stations, full frequency re-use is defined as follows:

(1) Satellites must employ polarization discrimination so that, through the use of dual polarization, they shall be able to reuse both the uplink and downlink frequency band assignments.

(2) Satellites must be configured so that all assigned frequencies (in both polarizations) could be reused in beams serving widely separate areas.

(f) Exceptions to the requirements of paragraph (d) will only be made in accordance with Establishing of Satellite Systems Providing International Communications, 101 FCC 2d 1201 (1985).

(g) Space station antennas in the Fixed-Satellite Service must be designed to provide a cross-polarization isolation such that the ratio of the on axis co-polar gain to the cross-polar gain of the antenna in the assigned frequency band shall be at least 30 dB within its primary coverage area.

(h) Space stations to be operated in the geostationary satellite orbit must be:

(1) Designed with the capability of being maintained in orbit within 0.05^0 of their assigned orbital longitude,

(2) Maintained in orbit at their assigned orbital longitude within the longitudinal tolerance specified by the Commission, and

(3) The Commission may authorize operations at assigned orbital longitudes offset by 0.05^0 or multiples thereof from the nominal orbital location specified in the station authorizations.

(i) Antenna measurements of both co-polarized and cross-polarized performance must be made on all antennas employed by space stations both within the primary coverage area to facilitate coordination with other Commission space station licensees and outside the primary coverage area to facilitate international frequency coordination with other Administrations. The results of such measurements shall be submitted to the Commission within thirty days after preliminary in-orbit testing is completed.

(j) All operators of space stations shall file a semi-annual report with the Common Carrier Bureau and the Commission's Laurel, Maryland field office containing the following information:

(1) Status of satellite construction and anticipated launch dates, including any major problems or delays encountered;

(2) A listing of any non-scheduled transponder outages for more than thirty minutes and the cause(s) of such outages;

(3) A detailed description of the utilization made or anticipated to be made of each transponder on each of the in-orbit satellites. That description should identify the total capacity or the percentage of time each transponder is actually used for transmission, the amount of capacity (if any) sold but not in service and the amount of unused capacity in the transponder. If the transponder is reserved as a spare, the operating transponder being protected should be identified. If the transponder is used for preemptible or occasional services, the nature of these services and amount of time preemptible or occasional services that are provided over the transponder should also be identified; and

(4) Identification of any transponders not available for service or otherwise not performing to specifications, the cause of these difficulties, and the date any transponder was taken out of service or the malfunction identified.

10. A new Section 25.211 is added to read as follows:

§ 25.211 Video transmissions in the Domestic Fixed - Satellite Service.

(a) Downlink analog video transmissions in the band 3700-4200 MHz shall be transmitted only on a center (frequency of 3700 + 20N MHz, where N=1 to 24. The corresponding uplink frequency shall be 2225 MHz higher.

(b) All 4/6 GHz analog video transmissions shall contain an energy dispersal signal at all times with a minimum peak-to-peak bandwidth set at whatever value is necessary to meet the power flux density limits specified in § 25.208(a) and successfully coordinated internationally and accepted by domestic adjacent satellite operators based on the use of state of the art space and earth station facilities. Further, all transmissions operating in frequency bands described in §§ 25.208(b) and (c) shall also contain an energy dispersal signal at all times with a minimum peak-to-peak bandwidth set at whatever value is necessary to meet the power flux density limits specified in §§ 25.208(b) and (c) and successfully coordinated internationally and accepted by domestic adjacent satellite operators based on the use of state of the art space and earth station facilities. The transmission of an unmodulated carrier at a power level sufficient to saturate transponder is prohibited, except by the space station licensee to determine transponder performance characteristics. All 12/14 GHz video transmissions for TV/FM shall identify the particular carrier frequencies for necessary coordination with adjacent domestic satellite systems and affected satellite systems of other administrations.

(c) All initial analog video transmissions shall be preceded by a video test transmission at an uplink e.i.r.p. at least 10 dB below the normal operating level. The earth station operator shall not increase power until receiving

notification from the satellite network control center that the frequency and polarization alignment are satisfactory pursuant to the procedures specified in § 25.272. The stationary earth station operator that has successfully transmitted an initial video test signal to a satellite pursuant to this paragraph is not required to make subsequent video test transmissions if subsequent transmissions are conducted using exactly the same parameters as the initial transmission.

11. A new Section 25.212 is added to read as follows:

§ 25.212 Narrowband transmissions in the Fixed-Satellite Service.

(a) Except as otherwise provided by these rules and regulations, criteria for unacceptable levels of interference caused by other satellite networks shall be established on the basis of nominal operating conditions and with the objective of minimizing orbital separations between satellites.

(b) Emissions with an occupied bandwidth of less than 2 MHz are not protected from interference from wider bandwidth transmissions if the r.f. carrier frequency of the narrowband signal is within +/- 1 MHz of one of the frequencies specified in § 25.211(a).

12. Section 25.256 is added to read as follows:

§ 25.256 Guidelines for performing interference analyses for precipitation scatter modes.

(a) Once rain scatter coordination distance contours have been determined, it is necessary to determine the likelihood of impermissible levels of interference between the proposed earth station and each existing or proposed terrestrial station located within the rain scatter coordination distance.

(b) It may be presumed that any interference caused by precipitation scatter propagation mechanisms will be acceptable and that the interference paths may be eliminated from interference if the interference margin Pmar (p) defined in § 25.255(b) is greater than zero when the received interference power Prec (p) is computed on the basis of the available transmission loss between the earth station and terrestrial station due to scattering from precipitation.

(c) Additional information is provided by the reports and recommendations of the CCIR which serve as useful references. In particular, applicants and operators should be aware of the latest revisions of reports 382, 388, 448 and 569, XVIIth Plenary Assembly, Dusseldorf, 1990.

13. A new Subpart D is added to read as follows:

Table of Contents

Subpart D - Technical Operations

25.271 Control of transmitting stations.

25.272 General inter-system coordination procedures.

25.273 Duties regarding space communications transmissions.

25.274 Procedures to be followed in the event of interference.

25.275 Particulars of operation.

25.276 points of communication.

25.277 Temporary fixed earth station operations.

Subpart D - Technical Operations

§ 25.271 Control of transmitting stations.

(a) The licensee of a facility licensed under this Part is responsible for the proper operation and maintenance of the station.

(b) The licensee of a transmitting earth station licensed under this Part shall ensure that a trained operator is present on the earth station site, or at a designated remote control point for the earth station, at all times that transmissions are being conducted. No operator's license is required for a person to operate or perform maintenance on facilities authorized under this Part.

(c) Authority will be granted to operate a transmitting earth station by remote control only on the conditions that:

(1) The parameters of the transmissions of the remote station monitored at the control point, and the operational functions of the remote earth stations that can be controlled by the operator at the control point, are sufficient to insure that the operations of the remote station(s) are at times in full compliance with the remote station authorization(s);

(2) The earth station facilities are protected by appropriate security measures to prevent unauthorized entry or operations;

(3) Upon detection by the license, or upon notification from the Commission of a deviation or upon notification by another licensee of harmful interference, the operation of the remote station shall be immediately suspended by the operator at the control point until the deviation or interference is corrected, except that transmissions concerning the immediate safety of life or property may be conducted for the duration of the emergency; and

(4) The licensee shall have available at all times the technical personnel necessary to perform expeditiously the technical servicing and maintenance of the remote stations.

(d) The licensee shall insure that the licensed facilities are properly secured against unauthorized access or use whenever an operator is not present at the transmitter.

§ 25.272 General inter-system coordination procedures.

(a) Each space station licensee in the Fixed-Satellite Service shall establish a satellite network control center which will have the responsibility to monitor space-to-Earth transmissions in its system. This would indirectly monitor uplink earth station transmissions in its system and to coordinate transmissions in its satellite system with those of other systems to prevent harmful interference incidents or, in the event of a harmful interference incident, to identify the source of the interference and correct the problem promptly.

(b) Each space station licensee shall maintain on file with the Commission and with its Laurel, Maryland field office a current listing of the names, titles, addresses and telephone numbers of the points of contact for resolution of interference problems. Contact personnel should include those responsible for resolution of short term, immediate interference problems at the system control center, and those responsible for long term engineering and technical design issues.

(c) The transmitting earth station licensee shall provide the operator(s) of the satellites, on which the licensee is authorized to transmit, contact telephone numbers for the control center of the earth station and emergency tele-

phone numbers for key personnel; a current file of these contacts shall be maintained at each satellite system control center.

(d) An earth station licensee shall ensure that each of its authorized earth stations complies with the following:

(1) The earth station licensee shall ensure that there is continuously available means of communications between the satellite network control center and the earth station operator or its remote control point as designated by the licensee.

(2) The earth station operator shall notify the satellite network control center and receive permission from the control center before transmitting to the satellite or changing the basic characteristics of a transmission.

(3) The earth station operator shall keep the space station licensee informed of all actual and planned usage.

(4) Upon approval of the satellite network control center, the earth station operator may radiate an RF carrier into the designated transponder. Should improper illumination of the transponder or undue adjacent transponder interference be observed by the satellite network control center, the earth station operator shall immediately take whatever measures are needed to eliminate the problem.

(5) The space station licensee may delegate the responsibility and duties of the satellite network control center to a technically qualified user or group of users, but the space station licensee shall remain ultimately responsible for the performance of those duties.

§ 25.273 Duties regarding space communications transmissions.

(a) No person shall:

(1) Transmit to a satellite unless the specific transmission is first authorized by the satellite network control center;

(2) Conduct transmissions over a transponder unless the operator is authorized by the satellite licensee or the satellite licensee's successor in interest to transmit at that time; or

(3) Transmit in any manner that causes unacceptable interference to the authorized transmission of another licensee.

(b) Satellite operators shall provide upon request by the Commission and by earth station licensees authorized to transmit on their satellites relevant information needed to avoid unacceptable interference to other users, including the polarization angles for proper illumination of a given transponder.

(c) Space station licensees are responsible for maintaining complete and accurate technical details of current and planned transmissions over their satellites, and shall require that authorized users of transponders on their satellites, whether by tariff or contract, provide any necessary technical information in this regard including that required by § 25.272. Based on this information, space station licensees shall exchange among themselves general technical information concerning current and planned transmission parameters as needed to identify and promptly resolve any potential cases of unacceptable interference between their satellite systems.

(d) Space stations authorized after [effective date of rules] which do not satisfy the requirements of § 25.210 may be required to accept greater constraints in resolving interference problems than complying ones. The extent of these constraints shall be determined on a case-by-case basis.

§ 25.274 Procedures to be followed in the event of harmful interference.

(a) The earth station operator whose transmission is suffering harmful interference shall first check the earth station equipment to ensure that the equipment is functioning properly.

(b) The earth station operator shall then check all other earth stations in the licensee's network that could be causing the harmful interference to ensure that none of the licensee's earth stations are the source of the interference and to verify that the source of interference is not from a local terrestrial source.

(c) After the earth station operator has determined that the source of the interference is not another earth station operating in the same network or from a terrestrial source, the earth station operator shall contact the satellite system control center and advise the satellite operator of the problem. The control center operator shall observe the interference incident and make reasonable efforts to determine the source of the problem. A record shall be maintained by the control center operator and the earth station operator of all harmful interference incidents and their resolution. These records shall be made available to an FCC representative on request.

(d) Where the suspected source of the interference incident is the operation of an earth station licensed to operate on one or more of the satellites in the satellite operator's system, the control center operator shall advise the offending earth station of the harmful interference incident and assist in the resolution of the problem where reasonably possible.

(e) The earth station licensee whose operations are suspected of causing harmful interference to the operations of another earth station shall take reasonable measures to determine whether its operations are the source of the harmful interference problem. Where the operations of the suspect earth station are the source of the interference, the licensee of that earth station shall take all measures necessary to eliminate the interference.

(f) At any point, the system control center operator may contact the Commission's Laurel, Maryland office to assist in resolving the matter. This office specializes is the resolution of satellite interference problems. All licensees are required to cooperate fully with the Commission in any investigation of interference problems.

(g) Where the earth station suspected of causing interference to the operations of another earth station cannot be identified or is identified as an earth station operating on a satellite system other than the one on which the earth station suffering undue interference is operating, it is the responsibility of a representative of the earth station suffering harmful interference to contact the control center of other satellite systems.

§ 25.275 Particulars of operation.

(a) Radio station authorizations issued under this Part will normally specify only the frequency bands authorized for transmission and/or reception of the station.

(b) When authorized frequency bands are specified in the station authorization, the licensee is authorized to transmit any number of r.f. carriers on any discrete frequencies within an authorized frequency band in accordance with the other terms and conditions of the authorization and the requirements of this Part. Specific r.f. carrier frequencies within the authorized frequency band shall be selected by

the licensee to avoid unacceptable levels of interference being caused to other earth, space or terrestrial stations. Any coordination agreements, both domestic and international, concerning specific frequency usage constraints, including non-use of any particular frequencies within the frequency bands listed in the station authorization, are considered to be conditions of the station authorization.

(c) A license for a transmitting earth station will normally specify only the r.f. carriers having the highest e.i.r.p. density, the narrowest bandwidth, and the largest bandwidth authorized for transmission from that station. Unless otherwise specified in the station authorization, the licensee is authorized to transmit any other type of carrier not specifically listed which does not exceed the highest e.i.r.p., e.i.r.p. density and bandwidth prescribed for any listed emission.

(d) Only the most sensitive emission(s) for which protection is being afforded from interference in the authorized receive frequency band(s) will be specified in the station authorization.

§ 25.276 Points of communication.

(a) Unless otherwise specified in the station authorization, an earth station is authorized to transmit to any space station in the same radio service provided that permission has been received from the space station operator to access that space station.

(b) Space stations licensed under this Part are authorized to provide service to earth stations located within the specified service area. Coastal waters within the outer continental shelf shall be considered to be included within the service area specified by the named land mass.

(c) Transmission to or from foreign points over space stations in the Fixed-Satellite Service, other than those operated by the International Telecommunications Satellite Organization and Inmarsat, are subject to the (policies established in Transborder Satellite Video Services, 88 FCC 2d 258 (1981). and Establishing of Satellite Systems Providing International Communications, 101 FCC 2d 1201 (1985), and the procedures promulgated thereunder.

§ 25.277 Temporary fixed earth station operations.

(a) When an earth station in the Fixed-Satellite Service is to remain at a single location for fewer than 6 months, the location may be considered to be temporary fixed. Services provided at a single location which are initially known to be of longer than six months' duration shall not be provided under a temporary fixed authorization.

(b) When a station, authorized as a temporary fixed earth station, is to remain at a single location for more than six months, application for a regular station authorization at that location shall be filed at least 30 days prior to the expiration of the six-month period.

(c) The licensee of an earth station which is authorized to conduct temporary fixed operations in bands shared co-equally with terrestrial fixed stations shall provide the following information to the licensees of all terrestrial facilities lying within the coordination contour of the proposed temporary fixed earth station site before beginning transmissions:

(1) the name of the person operating the station and the telephone number at which the operator can be reached directly;

(2) the exact frequency or frequencies used and the type of emissions and power levels to be transmitted; and

(3) the commencement and anticipated termination dates of operation from each location.

(d) Transmissions may not be commenced until all affected terrestrial licensees have been notified and the earth station operator has confirmed that unacceptable interference will not be caused to such terrestrial stations.

(e) Operations of temporary fixed earth stations shall cease immediately upon notice of harmful interference from the Commission or the affected licensee.

APPENDIX D

Part 25 of the Commission's Rules and Regulations (Chapter I of Title 47 of the Code of Federal Regulations) is proposed to be amended as follows:

PART 25 - SATELLITE COMMUNICATIONS

1. The authority citation for Part 25 continues to read as follows:

AUTHORITY: §§ 25.101 to 25.531 issued under Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154. Interpret or apply secs. 101-104, 76 Stat. 419-427; 47 U.S.C. 701-744.

2. A new Section 25.277(f) is added to read as follows:

§ 25.277 Temporary fixed earth station operations.

* * * * *

(f)***

(f)(1) Single or multi-piece antennas less than 3 meters in diameter intended for use on a transportable basis should be qualified by the manufacturer as a transportable antenna. Samples of these antennas should be tested for compliance periodically during the manufacturing process (just as any other small antenna would be), and then subject to environmental tests simulating the transportable environment. These antennas would then be put back on the range to see that they are still compliant.

(2) These antennas would be annually tested using a receive signal provided by a cooperating earth station pursuant to § 25.132(b). If these results indicate a variance by more than 2 dB from the manufacturer's published data, then the antenna would be sent out for repair and range test, or replacement.

(3) Damage to the antenna that could cause a change in the shape of the reflector or is visually apparent shall be taken our of service immediately and tested (pursuant to § 25.132(b).

(4) Any other damage to the antenna shall be cause for replacement of the damaged parts and readjustment of those parameters such as feed centering and focal length that can successfully be done in the field. An antenna thus repaired shall then go through the annual qualification procedure in paragraph (2) of this section.

APPENDIX E

INITIAL REGULATORY FLEXIBILITY ANALYSIS

I. Reason for Action

In this proceeding the Commission seeks to develop a record and to solicit comments on the proposed rule. These proposed rules are designed to implement recommendations made by the joint industry/government Advisory Committee on 2^0 satellite spacing and Conus Communications Company Limited Partnership.

II. Objective

This proceeding will elicit comments on the public interest benefits and costs of the proposed rule in accordance the Commission's obligations under the mandate of Title III of the Communications Act of 1934.

III. Legal Basis

The legal basis of this action is found in Sections 4(i) and 303 of the Communications Act, 47 U.S.C. §§ 4(i) and 303.

IV. Description, Potential Impact and Number of Small Facilities Affected

The proposed rule would apply to all transportable earth station operators including small satellite newgathering operators. The proposed rule would establish operational and technical procedures designed to alleviate adjacent satellite interference and may increase the reporting and cost burden on all satellite licensees.

V. Reporting, Recordkeeping and Other Compliance Requirements

The proposed rules will, in some instances, create additional burdens, but are necessary in order to reduce interference incidents.

VI. Federal Rules Which Overlap, Duplicate or Conflict with the Proposed Rules

There is no overlap, duplication or conflict.

VII. Any Significant Alternative Minimizing Impact on Small Entities and Consistent with Stated Objectives

In order to be effective, these rules must apply to all licensees and thus there is no significant alternative.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELESPHERE NETWORK, INC.,
Complainant,

v.

MICHIGAN BELL TELEPHONE COMPANY,	File No. E-89-428
WISCONSIN BELL, INC.,	File No. E-89-429
PACIFIC BELL TELEPHONE COMPANY,	File No. E-89-429
PACIFIC NORTHWEST BELL TELEPHONE COMPANY,	File No. E-89-430
MOUNTAIN STATES TELEPHONE & TELEGRAPH COMPANY,	File No. E-89-432
NORTHWESTERN BELL TELEPHONE COMPANY, and	File No. E-89-433
SOUTHWESTERN BELL TELEPHONE COMPANY,	File No. E-89-434

Defendants.

MEMORANDUM OPINION AND ORDER

Adopted: January 29, 1993; Released: March 1, 1993

By the Commission:

TABLE OF CONTENTS

Topic	Paragraph No.
I. INTRODUCTION	1
II. BACKGROUND	2 - 6
III. DISCUSSION	7 - 39
A. Liability for Damages	7 - 16
1. Contentions of the Parties	7 - 11
2. Discussion	12 - 17
B. Damages and Interest Claims	18 - 39
1. Damages	18 - 36
a. Contentions of the Parties	19 - 26
b. Discussion	27 - 36
2. Interest on Damages	37 - 39
a. Contentions of the Parties	37 - 38
b. Discussion	39
IV. CONCLUSION	40
V. ORDERING CLAUSES	41 - 43

I. INTRODUCTION

1. In this Memorandum Opinion and Order we find that the complainant in these consolidated Section 208 proceedings,[1] Telesphere Network, Inc. (Telesphere),[2] has met its burden of establishing that the defendant local exchange carriers (LECs) have violated Section 201(b) of the Communications Act by earning in excess of the rate of return for interstate access services prescribed by the Commission for the period October 1, 1985 through December 31, 1986. In addition, we award Telesphere damages and interest for defendants' rate of return violations in the amount specified below.

II. BACKGROUND

2. The case presented by the complainant is virtually identical to that presented by the complainant in *MCI Telecommunication Corporation v. Pacific Northwest Bell Telephone Co.*[3] In that proceeding, we held that LEC rates that produced earnings in excess of a Commission prescription were unjust and unreasonable within the meaning of Section 201(b) of the Communications Act (the "Act").[4] We also held that a complainant/customer is entitled to recover damages to the extent that it can show that it suffered actual damage as a consequence of such violations. Subsequently, in the damages phase of the proceeding, we held that MCI had properly shown that it had been harmed by paying the defendants' rates that produced the excessive earnings. We awarded the complainant monetary damages, plus interest computed at the IRS rate.[5]

3. A detailed accounting of the Commission's rate of return regulatory scheme as well as relevant Commission and court decisions is set forth in the *MCI Liability Order* and the *MCI Damages Order*[6] and will not be repeated at

[1] While Telesphere filed separate complaints against the named defendants, the proceedings have been consolidated for disposition due to the similarity of the issues and arguments raised by the parties.

[2] Telesphere is currently a debtor in bankruptcy before the United States Bankruptcy Court for the Northern District of Illinois.

[3] MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co., 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon. denied*, 5 FCC Rcd 3463 (1990) (*MCI Reconsideration Order*) (jointly "*MCI Orders*"), *appeal dismissed sub nom. Mountain States Tel. and Tel. Co., et al. v. FCC*, 951 F.2d 1259 (10th Cir. 1991) (per curiam). *See also*, American Telephone and Telegraph Co. v. Northwestern Bell Telephone Co., 5 FCC Rcd 143 (1990), *appeal dismissed sub nom. Mountain States Tel. and Tel. Co., et al. v. FCC*, 951 F.2d 1259 (10th Cir. 1991).

[4] Section 201(b), 47 U.S.C. § 201(b), provides that "[a]ll charges, practices, classifications, and regulations for and in connection with ... communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful."

[5] MCI Telecommunications Corporation v. Pacific Bell Telephone Company, et al., FCC 93-70 (released February 8, 1993) (*MCI Damages Order*).

[6] *MCI Liability Order*, 5 FCC Rcd at 217-218; *MCI Damages Order* at paras. 2-3.

length here. However, a brief discussion of the development and implementation of the Commission's rate of return prescription is helpful to our analysis of the instant complaints.

4. Following the divestiture of the former Bell system and the concurrent development of the access charge system,[7] the Commission prescribed a rate of return system for all eight entities that emerged after divestiture (i.e., AT&T and the seven Regional Bell Holding Companies) and approximately 1400 other local exchange carriers as well. In a broad rulemaking proceeding, the Commission adopted: (1) methodologies to be used to prescribe maximum rates of return; (2) procedures for represcribing rates of return on a regular basis; (3) a system of monitoring carriers' earnings; and (4) a requirement that overearnings be refunded, either directly to those who had paid rates that produced the overearnings, or pursuant to automatic, prospective adjustments to tariff rates.[8] For the 15-month time period at issue in the instant complaints, October 1, 1985 through December 31, 1986, local exchange carriers, including the defendants, were required to file rates calculated to earn a 12.75 percent rate of return for overall interstate access services.[9] Because the initial review period would be only 15 months rather than the two years of subsequent review periods, the Commission expanded the "buffer";[10] that would be used during this initial monitoring period to determine whether the prescription had been violated.[11] Carriers were given notice that a 13.10 percent level of earnings would be the maximum allowable rate of return on overall interstate earnings and 13.25 percent would be the maximum allowable return for any access service category.[12]

5. In January 1988, the U.S. Court of Appeals for the District of Columbia Circuit set aside the automatic refund mechanism as arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce."[13] The Court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate of return prescription."[14]

6. In February 1988, MCI filed formal complaints against a number of local exchange carriers, including the defendants in the instant proceeding, alleging violations of the Commission's rate of return prescription for the October 1, 1985 through December 31, 1986 monitoring period and requesting monetary damages. Telesphere filed the complaints that are the subject of this Order in September 1989, also seeking damages for alleged rate of return prescription violations.[15] In January 1990, the Commission released the *MCI Liability Order* granting MCI's complaints and directing MCI to file supplemental complaints for damages. In January 1991, however, the Commission placed all pending rate of return complaints, including MCI's supplemental complaints for damages, in abeyance pending resolution of a related court remand in *Illinois Bell Tel. Co. v. FCC*.[16] Following the return of the proceedings to active status in December 1991 and the completion

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[7] The Commission has prescribed for all local exchange carriers, including the defendants, a methodology known as the "access charge system," which carriers are required to follow in tariffing their interstate access services. The system determines, *inter alia*, the carriers' overall rate structure and the allocation of costs within that structure, and was in effect during the period covered by the complaints. The access charge system is codified in Part 69 of the Commission's rules. *See* 47 C.F.R. § 69.1 *et seq.* (1988). These rules were developed in a proceeding that was the subject of numerous challenges on appeal. With a few exceptions not relevant to the instant complaint proceedings, these appeals were denied by the D.C. Circuit. *See NARUC v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985).

[8] *See* Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Carriers, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), (Phase I Order), *on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,103 (Apr. 1, 1986) (Phase I Reconsideration); *on further reconsideration*, 2 FCC Rcd 190 (1987). *See also*, Procedures and Methodologies to Establish Reporting Requirements, CC Docket No. 86-127, FCC 86-514 (released Dec. 3, 1986), 52 Fed. Reg. 273 (Jan. 5, 1987).

[9] The 12.75 percent rate of return was prescribed by the Commission in 1981 for the unified Bell System. *AT&T Co.*, 86 FCC 2d 221, 251 (1981). In reviewing this prescription on appeal, the District of Columbia Circuit held that the Commission had acted reasonably in selecting a return within a zone of reasonableness. *See United States v. FCC*, 707 F.2d 610, 615-619 (D.C. Cir. 1983). Following divestiture, the Commission, pursuant to notice and comment rulemaking procedures, directed AT&T and the BOCs to target their rates to achieve a 12.75 percent return. *See* MTS & WATS Market Structure, 93 FCC 2d 241, 315-316 (1983). In the rate of return proceedings, the Commission determined, based on its review of the record, that the 1981 prescription would continue in force for an interim period (e.g., until the rulemaking was completed and the methodologies and procedures adopted therein were available for prescribing a new rate of return). Phase I Order, 50 Fed. Reg. at 41,350 (para. 4).

[10] *See MCI Liability Order*, 5 FCC Rcd at 217:

> ... the Commission established both an authorized rate of return and a 'spread' or 'buffer' above that return for use in proceedings relating to the enforcement of the prescription. In other words, the authorized return would be employed in computing tariff rates; the spread, or buffer, would be used in combination with the authorized return 'to determine whether a rate of return prescription had been violated.' [footnote omitted.]

[11] *Phase I Order*, 50 Fed. Reg. at 41,352 (para. 21).

[12] 47 C.F.R. § 65.701(b) (1990).

[13] *American Telephone & Telegraph Co. v. FCC*, 836 F.2d 1386, 1390 (D.C. Cir. 1988) (*AT&T v. FCC*). For a detailed discussion of *AT&T v. FCC*, see *MCI Liability Order*, 5 FCC Rcd at 221-223.

[14] *Id.*, 836 F.2d at 1392.

[15] During this same time period, numerous similar complaints were filed by other interstate access customers alleging violations of the Commission's rate of return prescription for the same time period.

[16] 911 F.2d 776 (D.C. Cir. 1990). *See* Telesphere Network, Inc. v. Chesapeake & Potomac Telephone Co., *et al.*, 6 FCC Rcd 653 (Com.Car.Bur. 1991). The Commission acted on the remand in October 1991. *See* Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, CC Docket No. 86-497, 7 FCC Rcd 296 (1991), *appeal docketed sub nom. Illinois Bell Tel. Co., et al. v. FCC*, No. 90-1020 (D.C. Cir. Jan. 11, 1991). On December 23, 1991, the Bureau released an order reactivating the instant proceedings. *See Order*, 6 FCC Rcd 7535 (Com.Car.Bur. 1991).

of discovery,[17] the parties to the various proceedings were required to submit initial briefs and reply briefs setting forth their respective claims and arguments.[18]

III. DISCUSSION

A. Liability For Damages

1. Contentions of the Parties

7. Telesphere alleges that the rates it paid for certain of the defendants' interstate access services during the period from October 1, 1985 through December 31, 1986 were unjust and unreasonable in violation of Section 201(b) of the Act.[19] Telesphere supports its allegations with evidence taken from reports filed with the Commission by the defendants for the 15-month period at issue that show that defendants achieved earnings in excess of this Commission's prescribed rate of return in one or more of the three interstate access categories established for the purpose of enforcing that rate of return prescription.[20]

8. Telesphere requests that the Commission declare that the defendant LECs' charges for the period from October 1, 1985 through December 31, 1986 are in violation of the rate of return prescription and Section 201(b) of the Act, and order the defendant LECs to pay damages to Telesphere equal to the difference between the amount actually paid by Telesphere for interstate access service during the period and the amount that Telesphere would have paid if the defendants' charges earned no more than the maximum allowable rate of return, plus interest.

9. Defendants advance a number of arguments to support their claim that Telesphere has failed to state a cause of action under the Act, most of which were full considered and disposed of in the *MCI Liability Order* and the *MCI Damages Order*.[21] The defendants make the threshold claim that earning in excess of a rate of return prescription is not a violation of the Act or any valid Commission rule or order; and, even if such action could be considered a violation, it could occur only if the return was exceeded by the company overall.[22] To bolster this argument, the defendants claim that Telesphere's complaints are specifically precluded by the D.C. Circuit's decision in *AT&T v. FCC* and a later decision by the Sixth Circuit in *Ohio Bell Tel. Co. v. FCC*.[23] Pacific Bell contends that recasting what

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[17] *See* Telesphere Network, Inc., v. Chesapeake and Potomac Tel. Co., *et al.*, 7 FCC Rcd 3515 (Com.Car.Bur. 1992) (*Discovery Order*).

[18] In the instant proceedings, the complainant and the defendants all filed initial briefs pursuant to the schedules established by the Bureau on September 30, 1992. Each of the defendants also filed a reply to Telesphere's brief; however, for reasons neither stated by Telesphere nor apparent from the record, Telesphere did not file a reply or otherwise respond to any of the defendants' initial briefs.

[19] The defendants are: Michigan Bell Telephone Company (Michigan Bell) and Wisconsin Bell, Inc. (Wisconsin Bell) (together the Ameritech Companies); Pacific Bell Telephone Company (Pacific Bell); Pacific Northwest Bell Telephone Company (PNB), Mountain States Telephone and Telegraph Company (MTN), and Northwestern Bell Telephone Company (NWB) (together the "U S West" or "USWC Companies"); and Southwestern Bell Telephone Company (SW Bell). At the time the complaints were filed, PNB, MTN, and NWB were wholly-owned subsidiaries of US West, Inc. The Commission certified and granted PNB, MTN and NWB's application for authority to consolidate on March 29, 1990. *See* The Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company, 5 FCC Rcd 1982 (1990). While for purposes of convenience and clarity we continue to use the acronyms PNB, MTN and NWB where appropriate, we occasionally refer to these defendants collectively as USWC or the USWC carriers.

[20] The interstate access service categories are special access, common line, and switched traffic sensitive. *See* 47 C.F.R. § 65.702 (1990). The monitoring reports filed by the various defendants recite that for the period October 1, 1985 through December 31, 1986, Michigan Bell earned a return of 13.37 percent in the switched access category; Wisconsin Bell earned a return of 16.66 percent in the switched access category; Pacific Bell earned a return of 14.51 percent in the switched traffic sensitive category; MTN earned returns in the switched traffic sensitive category of 14.60 percent in Arizona, 14.97 percent in New Mexico, 13.67 percent in Utah, 15.81 percent in Idaho, 15.20 percent in Montana and 14.93 percent in Wyoming; NWB earned returns in the special access category of 13.85 percent in Minnesota and 16.01 percent in North Dakota, 14.31 percent in Iowa, and 13.63 in Nebraska; NWB earned returns in the switched traffic sensitive category of 14.64% in Iowa, 14.44 percent in Minnesota, 15.79 percent in Nebraska and 19.71 percent in North Dakota; and SWB earned returns in the special access category of 15.43 percent in Missouri and 15.99 percent in Oklahoma and earned returns in the switched traffic sensitive category of 14.21 percent in Arkansas, 16.21 percent in Kansas, and 14.93 in Missouri.

[21] The arguments and claims made by the various defendants are, for the most part identical in their essentials. For convenience, we refer to the defendants' arguments as if they were part of the same pleading. To the extent that individual defendants make unique or separate arguments, we will address them accordingly.

[22] *See, e.g.*, Ameritech Companies Br. at 6-13; SW Bell Br. at 27; Pacific Bell Br. at 5-14.

[23] 949 F.2d 864 (6th Cir. 1991). In *AT&T v. FCC*, the court invalidated the Commission's procedure to enforce its rate of return prescriptions through automatic refunds of carrier overearnings to customers. In *Ohio Bell*, the court, relying on the D.C. Circuit's decision in *AT&T v. FCC*, vacated a Commission order which had directed refunds of LEC earnings in excess of the authorized rate of return for the special access category over a period of years in the context of a strategic pricing investigation. *Ohio Bell*, 949 F.2d at 874. The Sixth Circuit placed considerable weight on the statement in *AT&T v. FCC* indicating that the Commission viewed its rate of return prescription as both minimum and maximum ceilings on carrier earnings. 949 F.2d at 873, citing *AT&T v. FCC*, 836 F.2d at 1390. The Commission had since clarified, however, that it does not view a rate of return prescription as both a maximum and a minimum:

> [o]ur accumulated experience with rate of return prescriptions, and our review of the cost of capital evidence in this proceeding, convince us that there is no such point. * * * We believe there is a substantial gap between an earnings level that is fully adequate to assure attraction of capital on favorable terms, and an earnings level which, if sustained over time, would be confiscatory.

Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, 5 FCC Rcd 7507, 7532 (1990), *appeal docketed sub nom. Illinois Bell Tel. Co. v. FCC*, No. 90-1020 (D.C. Cir. Jan. 11, 1991).

amounts to a "refund" as a "damage award" does not cure the deficiencies the court found with a procedure which effectively requires the automatic refund of carrier overearnings but does not permit carriers to recoup underearnings.[24] The defendants argue that consistent with *AT&T v. FCC*, the Commission must consider underearnings in determining whether particular overearnings are in violation of the Act. The defendants maintain that because their earnings for overall interstate access service did not exceed the allowed 13.10 percent, there can be no violation of the Act regardless of earnings realized in individual interstate access categories.[25] The defendants add that *Ohio Bell*, issued after the release of the *MCI Liability Order*, reaffirms the proposition established in *AT&T v. FCC* that this Commission cannot award damages for carrier earnings without allowing the carrier to re-coup or off-set underearnings.[26] Defendants argue that these propositions are not confined to the Commission's ratemaking activities under Sections 204-205 of the Act[27] but are equally applicable when the Commission decides private complaints for damages under Section 208 of the Act.

10. Defendants also argue that any Commission order requiring a carrier to make refunds solely because the carrier has exceeded the authorized rate of return would constitute unlawful retroactive ratemaking.[28] As a related matter, the USWC carriers also argue that rates charged in conformity with a lawfully filed tariff cannot then be found to be unjust and unreasonable merely because they later proved to be too profitable.[29] Pacific Bell makes the additional claim that the Commission's action in CC Docket No. 84-800 did not create a private cause of action that would permit an individual remedy or cause of action based on earnings in excess of a prescribed rate of return.[30] The Ameritech Companies argue that the rates at issue were prescribed by the Commission and cannot be subject to refunds or damage claims.[31]

11. Each of the defendants argues that all of Telesphere's claims are barred by Section 415 of the Act, which establishes a two-year statute of limitations on the filing of complaints.[32] According to the defendants, Section 415 bars the recovery of any damages if sought more than two years after the occurrence of any overearnings, in this case, thus barring all recovery sought after December 31, 1988.[33]

2. Discussion

12. We have carefully examined the record before us and conclude that the defendants, all of whom were defendants in the MCI complaint proceedings, have cited no facts and have made no arguments here that would warrant a ruling contrary to the *MCI Orders*.

13. *Failure to State a Cause of Action:* In the *MCI Liability Order*, we rejected identical claims made by the same defendants and held that *AT&T v. FCC* establishes no precedent that bars an individual complainant from seeking a remedy under Section 208 of the Act for damages based on a carrier's reported overearnings.[34] Specifically, we stated that

> we are not persuaded by defendants' claims that earning in excess of a prescribed rate of return does not violate that Act or, if it does, that the Commission *is required* to take a carrier's underearnings as well as its overearnings into account in determining whether a violation has occurred.
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> * * * * * * *
>
> We find that a valid prescription bound the defendants to a maximum earnings limitation, and the defendants admit that they earned in excess of the amount during the period in question.[35]

We found further that *AT&T v. FCC* did not govern Section 208 complaint proceedings. The Commission has the authority to order a carrier to pay damages if a complainant meets the burden of establishing both a violation of the Act and the actual injury.[36]

14. In addition, we have previously held that enforcement of a rate of return prescription is not retroactive ratemaking because the obligation being enforced was set prospectively when the prescription was adopted.[37] Defendants have not persuaded us to alter our decision. We have also rejected the contention that rates charged in conformity with a lawfully filed tariff cannot be unjust and unreasonable.[38] As we stated in the *MCI Liability Order*, "legally effective, carrier-initiated tariffs can always be challenged as unreasonable and unlawful."[39] The issue raised by

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[24] *See, e.g.*, Pacific Bell Br. at 8; USWC Br. at 6-8; Ameritech Companies Br. at 6-13.

[25] *See, e.g.*, Pacific Bell Br. at 6. Extending this argument even further, MTN and NWB contend that the key rate of return with which Telesphere should be concerned is the overall earnings of USWC in the aggregate, not the individual categorical earnings of USWC's subsidiaries. In the aggregate, USWC states that its earnings were within the prescribed level. USWC Br. at 17-18.

[26] *See, e.g.*, USWC Br. at 6; Ameritech Companies Br. at 9.

[27] 47 U.S.C. §§ 204-205.

[28] *See e.g.*, USWC Br. at 7-8; Pacific Bell Br. at 10-14. Pacific Bell argues specifically that under *Illinois Bell v. FCC*, 966 F.2d 1478 (D.C. Cir. 1992) (*Illinois Bell*), the Commission may only engage in prospective ratemaking when the investigative and accounting requirements of §204(a) have not been met. Pacific Bell Br. at 10-11. We reject defendant's claim that the decision in *Illinois Bell* somehow leaves this Commission only with Section 205 authority in the face of a violation of our rate of return prescription. As we explained in the *MCI Damages Order*, *Illinois Bell* addresses the Commission's authority under Section 204, not Section 208. *See MCI Damages Order* at para. 27. The defendants' claim that the *Illinois Bell* decision deprives the Commission of authority to award damages for violations of a valid rate of return prescription has no merit.

[29] USWC Br. at 5-7.

[30] Pacific Bell Br. at 14-17.

[31] *See* Ameritech Companies Br. at 13-16.

[32] Section 415 provides, in pertinent part, that "[a]ll complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after...." 47 U.S.C. § 415(b) (1982). The term "overcharges" is defined in Section 415 "to mean charges for services in excess of those applicable thereto under the schedules of charges lawfully on file with the Commission." 47 U.S.C. § 415(g) (1982).

[33] *See*, Ameritech Companies Br. at 15-17; SW Bell Br. at 7-9.

[34] *MCI Liability Order*, 5 FCC Rcd at 222-23.

[35] *Id.* at 223 (emphasis in the original).

[36] *Id.*

[37] *Id.* at 222.

[38] *Id.*

[39] *MCI Liability Order*, 5 FCC Rcd at 222, quoting *Arizona Grocery v. Atchison, T & S.F.R. Co.*, 284 U.S. 370, 384 (1932).

these complaints is not the lawfulness of high profits in the abstract, but the lawfulness of profits in excess of a prescription. Accordingly we hold that, taking into account the buffer, profits in excess of a prescription are unjust and unreasonable.

15. *Rates Prescribed by the Commission.* The Ameritech Companies' argument that the complaints are barred because the rates in effect during the period in question were prescribed by the Commission was discussed at length and rejected in the *MCI Liability Order* and requires no further discussion here.[40] The Ameritech Companies have raised no new issues or set forth arguments that would persuade us to depart from our holdings.

16. *AT&T v. FCC* and *Ohio Bell:* We disagree with the defendants' claim that *AT&T v. FCC* and *Ohio Bell* compel us to dismiss Telesphere's complaints. As we emphasized in the *MCI Liability Order* and reaffirmed in the *MCI Damages Order*, automatic refunds and refunds ordered under Section 204 of the Act are different from individual actions for damages under Section 208. Unlike the automatic refund mechanism in *AT&T v. FCC* or the refund procedure in *Ohio Bell*, both of which resulted from rulemaking proceedings initiated at the Commission's discretion, individual actions for damages under Section 208 are initiated by private parties seeking damages for injuries to themselves; those private parties have the burden of establishing both a violation of the Act and actual injury.[41] The courts in *AT&T v. FCC* and *Ohio Bell* did not discuss private complaints for damages; they did not invalidate private actions for damages; and their holdings are not applicable to the different separately authorized complaint procedure set forth in Sections 206-209. Accordingly, those decisions do not require us to depart from our holding in the *MCI Liability Order* that defendants have violated the Communications Act by earning in excess of a valid rate of return prescription, thereby making their rates unjust and unreasonable under Section 201 of the Communications Act and themselves liable for damages to the extent a complainant/customer can establish that it was damaged as a result of the violation.[42]

17. *Statute of Limitations:* We held in the *MCI Liability Order* that the date a carrier files its final rate of return monitoring report is dispositive with regard to the date a complainant discovers the right or wrong or the facts on which such knowledge is chargeable as a matter of law.[43] Defendants have made no argument that persuades us to alter this determination. Accordingly, Section 415 does not bar Telesphere's complaints.

B. Damages and Interest Claims

18. Telesphere's damages claims rest primarily on the contention that the proper measure of damages it incurred as a result of the defendants' rate of return prescription violations is the difference between the amounts it actually paid the defendants for interstate access services during the October 1, 1985 through December 31, 1986 monitoring period and the amount it would have paid if the defendants' rates produced earnings that did not exceed the Commission's prescription. The defendants, however, have raised a number of challenges to Telesphere's damages claims, including a number of arguments that were previously considered and rejected by the Commission in the *MCI Liability Order* and the *MCI Damages Order*. We address the parties' contentions below.

1. Damages

a. Contentions of the Parties

19. As referenced above, Telesphere's damages claims rest primarily on the contention that the proper measure of the damages it incurred as a result of defendants' violations is the difference between the amount it actually paid defendants for interstate access services during the October 1, 1985 through December 31, 1986 period and the amount it would have paid if the defendants' rates had produced earnings that did not exceed the Commission's prescribed rate of return.[44] In addition, Telesphere argues that it is entitled to interest on the damages amounts. In the *Discovery Order*, the Bureau stated that it tended to agree, in principle, that a possible measure of the damages stemming from defendants' rate of return violations could be that difference.[45] The Bureau was not persuaded on the record before it, however, that a damages determination based solely on such a measure necessarily reflected actual damages incurred by Telesphere.[46] The defendants were invited to submit evidence that could serve to mitigate or otherwise reduce Telesphere's damages claims. Specifically, the Bureau stated that evidence demonstrating that Telesphere's share of excessive earnings realized in a particular access category by a defendant could be offset or otherwise reduced due to facts and circumstances surrounding Telesphere's purchase of other interstate access services from such defendant for the relevant monitoring period might be relevant.[47]

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[40] *Id.* at 222-23, para. 55.

[41] *See MCI Liability Order*, 5 FCC Rcd at 222-23, para. 55.

[42] *Id.* at 226, para. 86.

[43] In the *MCI Liability Order* we stated:

> the defendants filed the rate of return monitoring reports which...were developed by the Commission for several purposes, including making information about carrier earnings public[ly] available. Moreover, the monitoring reports relied on by MCI in its complaints were specifically designated by the Commission as a "final" and conclusively binding determination of a carrier's earnings.

5 FCC Rcd at 225. We note further that we have previously held that Section 415(e) is inapplicable to the type of complaints we deal with here. *See MCI Reconsideration Order*, 5 FCC Rcd at 3464. Section 415(e) concerns a carrier's liability to its customers for failure to transmit a message in accordance with its common carrier obligations. The instant complaints deal with the lawfulness of defendants' rates, not defendants' transmissions or obligations to transmit messages properly. *See id.*

[44] Telesphere Brief at 2, citing *Louisville & Nashville R. Co. v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925); Southern *Pacific Co. v. Darnell-Taenzer Co.*, 245 U.S. 531 (1918); *Adams v. Mills*, 286 U.S. 397 (1932); *Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 920 (1981).

[45] *Discovery Order*, 7 FCC Rcd at 3516, para. 6.

[46] *Id.*

[47] *Id.*

20. Although Telesphere contends that its damages should be measured by the difference between the charges it paid for defendants' services and the charges it would have paid had defendants earned no more than the authorized rate of return, Telesphere does not state or otherwise identify the specific amount of damages it seeks from any of the defendants. Instead, it represents, without qualification or amplification, that the damage amounts are set forth in defendants' responses to interrogatories that requested the defendants to perform damages computations in accordance with the stated measure of damages. Applying the measure of damages advocated by Telesphere, and based on information provided by the defendants, Telesphere seeks to recover payments made by Telesphere that contributed to defendants' overearnings in the switched traffic sensitive access service category, exclusive of interest, as follows: Pacific Bell - $70,000; Michigan Bell - $107; Wisconsin Bell - $3,231; MTN - $1,214; NWB - $2,072; and SWB - $7,299. These amounts were all derived by the respective defendants and represent the difference in the amounts defendants charged Telesphere for switched traffic-sensitive access services and the amount that would have been charged had the defendants' switched traffic-sensitive access rates produced earnings at the Commission's prescribed level.

21. The defendants challenge Telesphere's damages claims on a number of grounds, raising several arguments that were previously considered and rejected by the Commission in the *MCI Liability Order* and the *MCI Damages Order*. Defendants contend that by simply basing its damages claims on a calculation of Telesphere's prorated share of category-level overearnings, Telesphere asks the Commission to award it damages in the same amount it would have received under the automatic refund rule invalidated by the court in *AT&T v. FCC*.[48] The defendants maintain that such a result is expressly precluded by *AT&T v. FCC* as well as the court's decision in *Ohio Bell*.

22. Defendants next contend that, even if *AT&T v. FCC* and *Ohio Bell* do not preclude an award of damages, Telesphere's damages claims still fail because Telesphere's complaints do not establish a valid cause of action. According to defendants, to pursue a damages claim, Telesphere must first show that the defendants charged unjust and unreasonable rates for interstate access services during the period in question, not that defendants' rates produced excessive returns in individual service categories.[49] Moreover, defendants argue, Section 206 of the Act[50] requires Telesphere to prove injury, causation, and the amount of damages in addition to establishing a violation of the Act.[51] Defendants maintain that by simply referencing defendants' earned rates of return for individual access service categories, Telesphere has not only failed to allege any facts that would establish that defendants' rates were unjust and unreasonable during the period in question but has also failed to show that it sustained actual damage as a result of those rates.[52]

23. The defendants also contend that an award of damages to Telesphere based on carrier overearnings is inappropriate for equitable and policy reasons.[53] USWC vigorously argues that Telesphere is actually seeking restitution or a refund of tariffed charges, not damages. USWC argues that regardless of how Telesphere characterizes the relief it seeks, any form of refund or restitution to Telesphere would be contrary to the public interest.[54] USWC further contends that an award of damages would be inequitable because (i) USWC's total corporate rate of return would be driven below the confiscatory level; (ii) there was uncertainty surrounding the tariff filings during

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[48] *See, e.g.*, USWC Br. at 4-6. In addition, defendants contend that *Ohio Bell* makes clear that it was the end result of the automatic refund mechanism, not the mechanism itself, that was unlawful. Pacific Bell Br. at 7.

[49] USWC argues that Telesphere must specify an identifiable rate that Telesphere paid that was too high or too low. USWC Br. at 11. In addition, USWC cites to a 1970 circuit court decision to support its claim that where retroactive relief is ordered for rates paid pursuant to a tariff that is subsequently found unjust and unreasonable, the Commission must determine what a just and reasonable rate is. *Id.*, citing to *Middlewest Motor Freight Bureau v. United States*, 433 F.2d 212, 232 (8th Cir. 1970) (*Middlewest*), *cert. denied*, 402 U.S. 999 (1971). As we determined in the *MCI Damages Order*, USWC's reliance on *Middlewest* is misplaced. *MCI Damages Order* at n.56.

[50] *See* 47 U.S.C. § 206.

[51] *See, e.g.*, Pacific Bell Br. at 17; USWC Br. at 11-13.

[52] *See, e.g.*, Pacific Bell Br. at 17-18; USWC Br. at 12. USWC contends that the principle that Telesphere must still prove it was damaged and in what amount was established by the Supreme Court in *Southern Ry. Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 454-55 (1979) (*Seaboard*), in construing relevant sections of the Interstate Commerce Act. The Court stated:

> [O]ur sole concern is the Commission's decision not to investigate under § 15(8)(a) [204], a decision that has only two final consequences. First, the burden of proof with regard to *reasonableness* is placed on the shipper under § 13(1) [208] rather than on the carrier, who would have borne it in a § 15(8)(a) [204] proceeding. (With respect to all other aspects of lawfulness, however, the burden is borne by the shipper in both proceedings.) Second, the shipper's relief, if unlawfulness is proved, is limited under § 13(1) [208] to actual damages rather than the full refund of overcharges available under § 15(8)(a) [204].

USWC states that this ruling has been found applicable to proceedings under the Communications Act. *See Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221, 1235 n.35 (D.C. Cir. 1980) (*ARINC*), *cert. denied*, 451 U.S. 920 (1981). Here too, as we determined in the *MCI Damages Order*, USWC's reliance on case precedent is misplaced. *MCI Damages Order* at n.59.

[53] *See, e.g.*, USWC Br. at 13-17; Pacific Bell Br. at 21; SW Bell Br. at 4-6.

[54] USWC Br. at 13-19. USWC argues Telesphere must plead its case in equity and the Commission may only award a refund/damages if we find that the public interest will be served by a refund/damages award to Telesphere. USWC contends that the leading case in this area is *Moss v. Civil Aeronautics Board*, 521 F.2d 298 (D.C. Cir. 1975) (*Moss*), *cert. denied sub nom. Roberts v. Civil Aeronautics Board*, 424 U.S. 966 (1976), *reh'g denied*, 425 U.S. 966 (1976). USWC states that the refund in *Moss* "was governed by the equitable principles governing the law of restitution." USWC Br. at 14, citing to *Moss*, 521 F.2d at 304. We addressed this argument in the *MCI Damages Order* and found USWC's reliance on *Moss* to be misplaced.

the relevant period; and (iii) Telesphere would receive a windfall that would be inconsistent with sound equitable principles.[55]

24. For its part, Pacific Bell argues that Telesphere's claim for damages is flawed because Telesphere simply assumes that lower rates would have produced lower earnings and offers no probative evidence to show what a reasonable rate would have been or to otherwise support its damages claims.[56] Pacific Bell argues, as does USWC, that Telesphere would receive a windfall if it has passed the "overcharges" on to its customers and is now awarded damages.[57] Pacific Bell argues that had its access charges to Telesphere been lower in 1985-1986, it is almost certain that Telesphere's rates to its customers would have been lower.[58] Pacific Bell cautions the Commission to look at the "backdrop of the practical consequences" and ensure that any decision granting Telesphere "refunds" is equitable under the circumstances.[59] Pacific Bell further argues that, should the Commission award damages to Telesphere, the Commission should order Telesphere to pass the damages through to its end users in the form of a rate reduction.[60]

25. Finally, the defendants argue that even if the Commission determines that damages are lawful and appropriate, any damages award to Telesphere based on overearnings must be reduced to the extent that Telesphere purchased services from defendants in other access categories that produced underearnings.[61] Taking into account Telesphere's purchase of services in the common line and special access categories, Pacific Bell contends that Telesphere's damages based on overearnings by Pacific Bell on switched traffic sensitive services must be reduced to $19,000.[62] SW Bell submitted information purporting to show that, on a category-by-category basis, SW Bell's underearnings vis-a-vis Telesphere for the 1985-1986 monitoring period totalled $137,471,[63] well over Telesphere's $17,299 damages claim. The USWC carriers cite to information provided in their response to Telesphere's interrogatories to support their claim that Telesphere's switched traffic sensitive overpayment claims against MTN and NWB of $1,214 and $2,072 respectively, are more than offset by underearning in the common line category totalling $5,734 vis-a-vis Telesphere purchases.[64] Finally, Michigan Bell and Wisconsin Bell provided information which shows that, while Telesphere claims overpayments for switched traffic sensitive services in the amounts of $560 from Michigan Bell and $1,607 from Wisconsin Bell for the 1985-1986 monitoring period, Telesphere's prorated share of underearnings realized by these defendants in the common line category for the same period total $430 in the case of Michigan Bell and $672 in the case of Wisconsin Bell. Wisconsin Bell's information also shows underpayments attributable to Telesphere purchases in the special access category totalling $360. All of the defendants maintain that without taking into account substantial benefits realized by Telesphere by purchasing services at unreasonably low rates, Telesphere would receive a windfall profit that would be inconsistent with sound principles of equity.

26. For its part, Telesphere does not dispute the offset amounts claimed by any of the defendants or otherwise challenge their offset claims.

b. Discussion

27. *AT&T v. FCC and Ohio Bell:* The defendants' claims that the holdings in *AT&T v. FCC* and *Ohio Bell* control these proceedings and bar an award of damages to Telesphere are without merit for the reasons stated in both the *MCI Liability Order* and the *MCI Damages Order*. In the liability section above, we again emphasized that the court in *AT&T v. FCC* explicitly acknowledged this Commission's authority to order a carrier to disgorge earnings in excess of a rate of return prescription,[65] finding only the remedy component of the Commission's rate of return prescription (the automatic refund mechanism) to be unlawful.[66] More to the point, we emphasized that "the [*AT&T v. FCC*] opinion does not address Section 208 complaint proceedings nor purport to alter the statutory scheme of the Act or the remedies Congress established therein."[67] Similarly, as we stated in the *MCI Damages Order*, the *Ohio Bell* decision does not expand upon *AT&T v. FCC* and does not address this Commission's authority to award damages in private complaint actions under Section 208 of the Act.[68]

28. *Section 201(b) of the Act:* We turn now to the defendants' contention that Telesphere's damages claims must be dismissed because Telesphere has failed to prove defendants' rates were unjust and unreasonable within the meaning of Section 201(b) of the Act. In the liability section above, we held that the complainant met its burden of

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[55] USWC Br. at 17-19.

[56] Pacific Bell Br. at 14.

[57] *See, e.g., id.* at 13.

[58] *Id.* at 14. Pacific Bell cites to numerous newspaper and magazine articles to support this contention.

[59] *Id.* at 16, citing to *Las Cruces TV Cable v. FCC*, 645 F.2d 1041 (D.C. Cir. 1981) (*Las Cruces*). In *Las Cruces*, the court upheld, in part, and remanded, in part, a Commission decision requiring refunds under Section 204 of the Act. The court noted that *Las Cruces*

> is the first time that the Federal Communications Commission has attempted to articulate standards governing its award of refunds to customers of a communications common carrier under Section 204 of the Act.

645 F.2d at 1046. Pacific Bell's reliance on *Las Cruces* is unavailing, however, because equitable considerations that may impact a Section 204 investigation are not applicable in individual Section 208 complaint proceedings.

[60] Pacific Bell Br. at 21-22.

[61] *Id.* at 17-18.

[62] *Id.* at 21-22. The information submitted by Pacific Bell shows undercharges to Telesphere attributable to underearnings in the common line category of $51,000.

[63] *See* SW Bell Answers to Complainant's Interrogatories, filed Sept. 10, 1992.

[64] *See* USWC Response to Complainant's Interrogatories, filed Sept. 10, 1992.

[65] *AT&T v. FCC*, 836 F.2d at 1392 ("Thus, as we previously have concluded, the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate of return prescription").

[66] Indeed, the court in *Ohio Bell* recognized the continuing efficacy of our rate of return framework. *See* 949 F.2d at 868.

[67] *MCI Liability Order*, 5 FCC Rcd at 223, para. 56.

[68] *MCI Damages Order* at para. 26.

proof by establishing that the defendants violated our rate of return prescription.[69] Accordingly, the question before us now is not whether defendants' rates were unjust and unreasonable; rather the question now is whether the complainant suffered any measurable damage as a consequence of paying rates previously determined by the Commission to be unlawful under Section 201(b).

29. The defendants claim that even if Telesphere has sustained its burden and shown that defendants' rates were unjust and unreasonable, its damages claims must still fail because judicial precedent compels Telesphere to establish what a just and reasonable rate would have been as a prerequisite to recovering damages[70] is also unavailing. This argument was previously considered and rejected in the *MCI Damages Order*. We emphasized in that decision the Commission's authority to prescribe and enforce carriers' rates of return.[71] We also pointed out that the issue in these rate of return complaint proceedings is not whether individual rates are unlawful, but whether cumulative rates that produced earnings over and above a prescribed rate of return are unjust and unreasonable.[72] Accordingly, we held that the Bureau had properly determined in the *Discovery Order* that a proper starting point for assessing damages based on violations of a rate of return prescription is to look at the difference between the amount complainant paid for defendants' interstate access services and the amount it would have paid if defendants had charged rates that produced returns within the Commission's prescribed levels.[73] Telesphere has shown that it purchased services from defendants at rates that produced earnings over and above the defendants' prescribed levels. We find this showing to be a proper starting point for assessing the damage Telesphere suffered as a result of paying defendants' rates that produced such earnings.

30. *Damages and Offsets:* The defendants' arguments are devoted primarily to attempting to persuade the Commission that Telesphere's damages claims are really claims for restitution or refunds governed by equitable or public policy considerations. These considerations, according to defendants, militate against any award of damages to Telesphere based on excessive earnings. The defendants argue, in effect, that the damages Telesphere seeks are equivalent to refunds that would have been required under the refund mechanism invalidated by the court in *AT&T v. FCC*. We do not agree. We are concerned here with determining whether a particular customer, which has availed itself of a statutory complaint remedy under Title II of the Act, has sustained any measurable damage that can be traced to defendants' violations of the Act. Although a damages award under Section 208 of the Act might well be equal or substantially similar to a refund ordered under Section 204 of the Act,[74] this does not transform a private complaint action into a public enforcement proceeding subject to broad public interest considerations.

31. Consistent with our decisions in the *MCI Damages Order*, we find defendants' arguments with respect to "passing-on" to be unavailing. In rejecting this same argument, we said, "[w]hether [complainant] passed on the overcharges or absorbed them does not alter the fact that the defendants overcharged [complainant] in violation of a binding rate of return prescription and must answer for such violations."[75] The issue is not what Telesphere has done in response to paying excessive rates, but whether Telesphere has been damaged as a result of these excessive rates.[76]

32. Nor can we accept the defendants' related claim that we should require Telesphere to flow through any damages it may receive to its end user customers. Sections 206-209 of the Act give private parties the right to file complaints challenging the acts or omissions of carriers and to recover monetary damages resulting from such acts or omissions. Complainants, however, are charged, as Telesphere is in the instant cases, with the burden of establishing violations of the Act or Commission rule or order and the amount or extent of damage suffered as a consequence of such violations. Accepting defendants' flow through argument would, in effect, transform Telesphere's complaints into class action suits on behalf of its customers, a result neither expressly contemplated by, nor consistent with, the private remedy created under Sections 206-209 of the Act.

33. We similarly reject USWC's contention that a damages award to Telesphere is precluded because it would drive USWC's overall rate of return for USWC in the aggregate below the minimum necessary to raise capital to confiscatory levels. Assuming *arguendo*, that such an inquiry is relevant to a Section 208 damages claim, USWC has failed to provide sufficient record evidence for this Commission to assess the impact of any damages award upon its overall interstate rate of return. While USWC has provided some data in Exhibit A to its brief,[77] these data

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[69] In the *MCI Liability Order*, we held that the complainant therein could prove that defendants' rates were unjust and unreasonable by proving that the defendants violated our rate of return prescription. *See MCI Liability Order*, 5 FCC Rcd at 226.

[70] USWC Br. at 10, citing *Middlewest*, 433 F.2d 212, 232.

[71] For a full discussion of the Commission's authority to prescribe and enforce carriers' rates of return, *see MCI Liability Order*, 5 FCC Rcd 222-223.

[72] *MCI Damages Order* at para. 29.

[73] *Id.*

[74] *See Seaboard*, 442 U.S. 444, 455, n.8:

> If a shipper proves a rate is unreasonable and that he was damaged in the full amount he was overcharged, the outcome of a § 13(1) [§ 208] proceeding will be no different than that of a § 15(8)(a) [§ 204] proceeding in which the carrier fails to establish the reasonableness of the rate.

[75] *MCI Damages Order* at para. 31.

[76] While defendants have asserted that lower charges to complainant would have resulted in lower charges to complainant's customers, they have provided no persuasive evidence in support of this contention. Pacific Bell, for example, relies solely on press clippings that purportedly show that Telesphere's rates to its customers would have been affected by changes in defendants' rates. Pacific Bell Br. at 19-20. These clippings do not, however, establish, as a matter of law, that complainant, in fact, passed on defendants' overcharges to its customers.

[77] Exhibit A contains a summary and compilation of information submitted in MTN's and NWB's Forms 492 for the relevant monitoring period, a calculation of how much money USWC would have earned if its entire carrier enterprise earned exactly at a 12.75% rate of return, and the same calculation at a 13.10% rate of return.

made no clear showing of the amount by which an award to Telesphere would reduce USWC's overall interstate earnings or rate of return let alone that any such reduction would be confiscatory. For the reasons stated in the *MCI Damages Order*,[78] we find USWC's other equitable arguments regarding the uncertainty surrounding tariff filings during the 1985-86 period and an alleged windfall to Telesphere should it receive restitution equally unavailing.

34. We do find, however, the defendants' claims for offsets to be persuasive. At the outset, we find it significant that Telesphere elected not to respond to the defendants' offset claims. Given the clear discovery and briefing guidelines and schedules established by the Bureau, we can reasonably conclude that Telesphere does not dispute defendants' claim that Telesphere's damages should be reduced to the extent that Telesphere purchased interstate access services from the defendants' at rates that produced earnings below the prescribed levels. Accordingly, we will accept Pacific Bell's claim that Telesphere's claim for damages of $70,000 based on Pacific Bell's overearnings on switched traffic sensitive access services, should be reduced by $51,000, the amount of Pacific Bell's underearnings in the common line category attributable to purchases by Telesphere during the relevant monitoring period. Therefore, we award damages to Telesphere from Pacific Bell in the amount of $19,000. We address Telesphere's claim for interest on this amount in the sections below.

35. We also accept Wisconsin Bell's claim that Telesphere's claim for damages of $3,321 based on Wisconsin Bell's overearnings on switched traffic-sensitive services should be reduced by $1,351 the amount of Wisconsin Bell's underearnings in the common line category attributable to Telesphere's purchases during the relevant monitoring period. Further, Wisconsin Bell has also shown that it is entitled to an offset totalling $73 for underearnings in the special access category attributable to Telesphere's purchases.

36. As for Telesphere's damage claims against the remaining defendants, these defendants have shown, and Telesphere does not dispute, that the claimed damage amounts are completely offset by undercharges to Telesphere in the common line and special access categories during the period covered by the complaint. Accordingly, we conclude that Telesphere has failed to sustain any damages claim against these defendants.[79]

2. Interest on Damages Awards

a. Contentions of the Parties

37. Pacific Bell and Wisconsin Bell claim that Telesphere is not entitled to prejudgment interest should the Commission award damages to Telesphere.[80] The defendants ground their claim on the contention that the amount of damages has been sharply disputed in these proceedings.[81] The defendants claim that interest would penalize them even though they have not been accused of deliberate wrongdoing and interest is not necessary to make Telesphere whole.

38. Telesphere simply contends that it is entitled interest calculated from the date of the payments it made to defendants.[82] It did not specifically respond to any of the defendants' claims regarding interest nor did it specify an appropriate interest rate or otherwise attempt to compute interest on its claimed damages.

b. Discussion

39. In deciding whether to award interest in a particular common carrier complaint case we are generally guided by federal court practice, where the award of prejudgment interest "... is a matter left to the sound discretion of the trial court."[83] The award of interest in a common carrier complaint case is thus guided by considerations of fairness. Applying this standard, we are persuaded that an award of interest is appropriate in these cases. Telesphere was effectively deprived of the use of the excessive amounts it paid defendants as a result of defendants' unlawful rates while defendants, on the other hand, enjoyed the beneficial use for a substantial period of time of funds to which Telesphere rightfully has a claim. We are persuaded that interest is required not only to effect a full and fair remedy for Telesphere, which paid rates higher than it would have paid had defendant earned within the prescribed level, but also to avoid any unjust enrichment of defendants stemming from their charging rates that we have determined to be unjust and unreasonable under Section 201(b) of the Act.[84] We conclude that interest should be computed at the IRS rate for tax refunds.[85] In addition, we find that interest should begin to accrue from January 1, 1987, the day after which the 1985-1986 monitoring period ended. At that point, defendants were subject to the earnings limitations of a new monitoring period. Accordingly, we award inter-

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[78] *MCI Damages Order* at para. 32.

[79] In the *MCI Liability Order*, we rejected claims by the defendant carriers that the Commission is required to take into account a carrier's interstate access underearnings as well as overearnings in determining whether a violation of the Act has occurred. 5 FCC Rcd at 222-223, citing *Nader v. FCC*, 520 F.2d 182, 201 (D.C. Cir. 1975). *See also*, *New England Tel. & Tel. Co. v. FCC*, 826 F.2d 1101 (D.C. Cir. 1987), *cert. denied*, 109 S. Ct. 1942 (1989).In the *MCI Damages Order*, however, we further concluded that it is appropriate to consider defendants' underearnings in assessing a complainant's damage or injury resulting from defendants' overearnings for a particular monitoring period. *MCI Damages Order* at para. 39. We specifically rejected MCI's claims that this approach results in unlawful cross-subsidization. *Id.* at para. 40. The parties have provided no new arguments which would persuade us to alter our rulings.

[80] Because we conclude that the remaining defendants have all successfully established offsets that negate Telesphere's damages claims, we do not reach the issue of interest as to these defendants.

[81] *See, e.g.*, Pacific Bell Br. at 24.

[82] *See* Telesphere Br. at 2.

[83] *United States v. California Board of Equalization*, 650 F.2d 1127, 1132 (9th Cir. 1981), *aff'd*, 456 U.S. 901 (1982), *reh'g denied*, 456 U.S. 985 (1982).

[84] *See New England Tel. & Tel. Co. v. FCC*, 826 F.2d 1101, 1113 (D.C. Cir. 1987), *cert. denied*, 109 S. Ct. 1942 (1989) (carriers may reasonably be required "to pay full interest for earnings they had no right to retain in the first place.").

[85] We believe that the rationale adopted by the Commission for applying the IRS rate in pole attachment complaint proceedings under Section 204 of the Act, 47 U.S.C. § 204, is equally applicable here. In Teleprompter of Fairmont v. C&P of West Virginia, 79 FCC 2d 232 (1980), the Commission stated

est calculated at the IRS rate for tax refunds[86] from defendants to Telesphere from January 1, 1987 until the date of full payment to Telesphere.

IV. CONCLUSION

40. We have carefully reviewed the extensive record before us and have found, to the extent indicated here, that complainant is entitled to an award of damages, plus accumulated interest on such damages, for Pacific Bell's and Wisconsin Bell's violations of the Commission's rate of return prescription for the 1985-1986 monitoring period.

V. ORDERING CLAUSES

41. Accordingly, IT IS ORDERED, pursuant to Section 4(i), 4(j), 201, 206, 207, 208 and 209 of the Communications Act, as amended, 47 U.S.C. §§ 4(i), 4(j), 201, 206, 207, 208 and 209, that the above-captioned complaints filed by Telesphere ARE GRANTED to the extent indicated above and otherwise ARE DENIED.

42. IT IS FURTHER ORDERED that Pacific Bell SHALL PAY to Telesphere Network, Inc. the sum of $19,000 (Nineteen thousand dollars) within 60 days after the release date of this Memorandum Opinion and Order; and that Wisconsin Bell SHALL PAY to Telesphere Network, Inc. the sum of $1,424 (One thousand four hundred twenty-four dollars) within 60 days after the release date of this Memorandum Opinion and Order.

43. IT IS FURTHER ORDERED that Pacific Bell and Wisconsin Bell SHALL PAY to Telesphere Network, Inc. interest on the damages awarded here at the IRS rates set forth in Appendix A from January 1, 1987 until the date full payment is made.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

As a matter of fairness, we believe that the rate of interest applied in a pole attachment complaint proceeding should be readily available, easily applied, and periodically revised to reflect changes in borrowing costs. In light of these considerations, we find the interest rate for federal tax refunds and additional tax payments suitable for use in this type of proceeding. This rate appears in a variety of easily obtained official and commercial publications, and is revised on a regular basis. [footnote omitted.]

79 FCC 2d at 238.

[86] The applicable IRS rates are set forth in Appendix A.

APPENDIX A

Effective Period	Rate	Internal Revenue Service Citation
01/01/87 - 03/31/87	8%	Rev.Rul. 146, 1986-2 C.B. 208
04/01/87 - 06/30/87	8%	Rev.Rul. 87-23, 1987-13 I.R.B. 46
07/01/87 - 09/30/87	8%	Rev.Rul. 87-62, 1987-29 I.R.B. 10
10/01/87 - 12/31/87	9%	Rev.Rul. 87-87, 1987-36 I.R.B. 8
01/01/88 - 03/31/88	10%	Rev.Rul. 87-131, 1987-50 I.R.B. 6
04/01/88 - 06/30/88	9%	Rev.Rul. 88-17, 1988-10 I.R.B. 6
07/01/88 - 09/30/88	9%	Rev.Rul. 88-50, 1988-25 I.R.B. 39
10/01/88 - 12/31/88	10%	Rev.Rul. 88-86, 1988-41 I.R.B. 1
01/01/89 - 03/31/89	10%	Rev.Rul. 88-105, 1988-51 I.R.B. 4
04/01/89 - 06/30/89	11%	Rev.Rul. 89-36, 1989-1 C.B. 309
07/01/89 - 09/30/89	11%	Rev.Rul. 89-69, 1989-1 C.B. 310
10/01/89 - 12/31/89	10%	Rev.Rul. 89-99, 1989-2 C.B. 256
01/01/90 - 03/31/90	10%	Rev.Rul. 89-125, 1989-2 C.B. 257
04/01/90 - 06/30/90	10%	Rev.Rul. 90-19, 1990-1 C.B. 186
07/01/90 - 09/30/90	10%	Rev.Rul. 90-47, 1990-1 C.B. 187
10/01/90 - 12/31/90	10%	Rev.Rul. 90-71, 1990-35 I.R.B. 4
01/01/91 - 03/31/91	10%	Rev.Rul. 90-94, 1990-46 I.R.B. 16
04/01/91 - 06/30/91	9%	Rev.Rul. 91-20, 1991-11 I.R.B. 1
07/01/91 - 09/30/91	9%	Rev.Rul. 91-33, 1991-21 I.R.B. 1
10/01/91 - 12/31/91	9%	Rev.Rul. 91-50, 1991-37 I.R.B. 1
01/01/92 - 03/31/92	8%	Rev.Rul. 91-65, 1991-51 I.R.B. 1
04/01/92 - 06/30/92	7%	Rev.Rul. 92-21, 1992-14 I.R.B. 14
07/01/92 - 09/30/92	7%	Rev.Rul. 92-44, 1992-24 I.R.B. 86
10/01/92 - 12/31/92	6%	Rev.Rul. 92-77, 1992-38 I.R.B. 12

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ALLNET COMMUNICATION SERVICES, INC.,
Complainant,

v.

THE BELL ATLANTIC TELEPHONE COMPANIES, and	File No. E-91-112
CINCINNATI BELL TELEPHONE COMPANY,	File No. E-92-021
Defendants.	

MEMORANDUM OPINION AND ORDER

Adopted: January 29, 1993; Released: March 5, 1993

By the Commission:

TABLE OF CONTENTS

Topic	Paragraph No.
I. INTRODUCTION	1
II. BACKGROUND	2 - 6
III. DISCUSSION	7 - 45
A. Procedural Issue	7 - 9
1. Contentions of the Parties	7 - 8
2. Discussion	9
B. Liability for Damages	10 - 20
1. Contentions of the Parties	10 - 15
2. Discussion	16 - 20
C. Damages, Interest and Attorney's Fees Claims	21 - 45
1. Damages	22 - 40
a. Contentions of the Parties	22 - 30
b. Discussion	31 - 40
2. Interest and Attorney's Fees	41 - 45
a. Contentions of the Parties	41 - 43
b. Discussion	43 - 45
IV. CONCLUSION	46
V. ORDERING CLAUSES	47 - 50

I. INTRODUCTION

1. In this Memorandum Opinion and Order we find that the complainant in these consolidated Section 208 proceedings,[1] Allnet Communication Services, Inc. (Allnet), has met its burden of establishing that the defendant local exchange carriers (LECs)[2] have violated Section 201(b) of the Communications Act by earning in excess of the rate of return for interstate access services prescribed by the Commission for the period January 1, 1987 through December 31, 1988. In addition, we award Allnet damages and interest in the amounts specified below.

II. BACKGROUND

2. The case presented by the complainant is virtually identical to that presented by the complainant in *MCI Telecommunication Corporation v. Pacific Northwest Bell Telephone Co., et al.*[3] In that proceeding, we held that LEC rates that produced earnings in excess of a Commission prescription were unjust and unreasonable within the meaning of Section 201(b) of the Communications Act.[4] We also held that a complainant is entitled to recover damages to the extent that it can show that it suffered actual damage as a consequence of such violations. Subsequently, in the damages phase of the proceeding, we held that MCI had properly shown that it had been harmed by paying the defendants' rates that produced the excessive earnings and awarded the complainant monetary damages, plus interest computed at the IRS rate.[5]

3. A detailed accounting of the Commission's rate of return regulatory scheme as well as relevant Commission and court decisions is set forth in the *MCI Liability Order*

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[1] While Allnet filed separate complaints against the named defendants, the proceedings have been consolidated for disposition due to the similarity of the issues and arguments raised by the parties.

[2] The Bell Atlantic Telephone Companies (Bell Atlantic) are The Bell Telephone Company of Pennsylvania, The Diamond State Telephone Company, New Jersey Bell Telephone Company and the four Chesapeake and Potomac telephone companies (The Chesapeake and Potomac Telephone Company, The Chesapeake and Potomac Telephone Company of Maryland, The Chesapeake and Potomac Telephone Company of Virginia and The Chesapeake and Potomac Telephone Company of West Virginia). Bell Atlantic's subsidiaries are local exchange carriers providing exchange access service subject to the Commission's jurisdiction under Title II of the Communications Act of 1934, as amended.

[3] MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co., *et al.*, 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon. denied*, 5 FCC Rcd 3463 (1990) (*MCI Reconsideration Order*) (jointly "*MCI Orders*"), *appeal dismissed sub nom. Mountain States Tel. and Tel. Co., et al. v. FCC*, 951 F.2d 1259 (10th Cir. 1991) (per curiam). *See also*, American Telephone and Telegraph Co. v. Northwestern Bell Telephone Co., 5 FCC Rcd 143 (1990) (*AT&T Liability Order*), *appeal dismissed sub nom. Mountain States Tel. and Tel. Co., et al. v. FCC*, 951 F.2d 1259 (10th Cir. filed March 6, 1990).

[4] *MCI Liability Order* at 216-17. Section 201(b), 47 U.S.C. § 201(b), provides that "[a]ll charges, practices, classifications, and regulations for and in connection with . . . communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful."

[5] MCI Telecommunications Corporation v. Pacific Bell Telephone Company, *et al.*, FCC 93-70 (released February 8, 1993)

and the *MCI Damages Order* [6] and will not be repeated at length here. However, a brief discussion of the development and implementation of the Commission's rate of return prescription is helpful to our analysis of the instant complaints.

4. Following the divestiture of the former Bell system and the concurrent development of the access charge system,[7] the Commission prescribed a rate of return system for all eight entities that emerged after divestiture (i.e., AT&T and the seven Regional Bell Holding Companies) and approximately 1400 other local exchange carriers as well. In a broad rulemaking proceeding, the Commission adopted: (1) methodologies to be used to prescribe maximum rates of return; (2) procedures for represcribing rates of return on a regular basis; (3) a system of monitoring carriers' earnings; and (4) a requirement that overearnings be refunded, either directly to those who had paid rates that produced the overearnings, or pursuant to automatic, prospective adjustments to tariff rates.[8] For the two-year time period at issue in the instant complaints, January 1, 1987 through December 31, 1988, local exchange carriers, including the defendants, were required to file rates calculated to earn a 12 percent rate of return for overall interstate access.[9] In accordance with the Commission's allowance of a "buffer," carriers were given notice that 12.25 percent would be the maximum allowable rate of return on overall interstate earnings and that 12.40 percent would be the maximum allowable rate of return for any access service category.[10] The buffer[11] would be used to determine whether the prescription had been violated.[12]

5. In January 1988, the U.S. Court of Appeals for the District of Columbia Circuit set aside the automatic refund mechanism as arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce."[13] The court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate of return prescription."[14]

6. In February 1988, MCI filed formal complaints against a number of LECs alleging violations of the Commission's rate of return prescription for the October 1, 1985 through December 31, 1986 monitoring period and requesting monetary damages. Allnet filed similar complaints in September 1989, also seeking damages for alleged rate of return prescription violations for the initial 1985-1986 monitoring period. During the same time period, numerous similar complaints were filed by other interstate access customers alleging rate of return prescription violations for the initial 15-month monitoring period.[15] In January 1990, the Commission released its *MCI Liability Order* granting MCI's complaints and directing MCI to file supplemental complaints for damages. In August and December 1991, Allnet filed a second round of complaints against the defendant LECs alleging violations of the Commission's prescription for the January 1, 1987 through December 31, 1988 monitoring period.[16] It is this second round of complaints that is

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(*MCI Damages Order*).

[6] *MCI Liability Order*, 5 FCC Rcd at 217-218 (1990); *MCI Damages Order* at 2-3.

[7] The Commission has prescribed for all local exchange carriers, including the defendants, a methodology known as the "access charge system," which carriers are required to follow in tariffing their interstate services. The system determines, *inter alia*, the carriers' overall rate structure and the allocation of costs within that structure, and was in effect during the period covered by the complaints. The access charge system is codified in Part 69 of the Commission's rules. *See* 47 C.F.R. § 69.1 *et seq.* These rules were developed in a proceeding that was the subject of numerous challenges on appeal. With a few exceptions not relevant to the instant complaint proceedings, these appeals were denied by the D.C. Circuit. *See NARUC v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985).

[8] *See* Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Carriers, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), (Phase I Order), *on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 1103 (Apr. 1, 1986) (Phase I Reconsideration); *on further reconsideration*, 2 FCC Rcd 190 (1987). *See also*, Procedures and Methodologies to Establish Reporting Requirements, CC Docket No. 86-127, FCC 86-514 (released Dec. 3, 1986), 52 Fed. Reg. 273 (Jan. 5, 1987).

[9] *See* Authorized Rate of Return for the Interstate Access Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase III, FCC 86-354, 51 Fed. Reg. 32,920 (Sept. 17, 1986) (*Phase III Order*), *recon. denied*, 2 FCC Rcd 5636 (1987). *See also*, Procedures and Methodologies to Establish Reporting Requirements, CC Docket No. 86-127, FCC 86-514 (released Dec. 3, 1986), 52 Fed. Reg. 273 (Jan. 5, 1987).

[10] 47 C.F.R. § 65.700

[11] *See MCI Liability Order*, 5 FCC Rcd at 217:

> . . . the Commission established both an authorized rate of return and a spread' or buffer' above that return for use in proceedings relating to the enforcement of the prescription. In other words, the authorized return would be employed in computing tariff rates; the spread, or buffer, would be used in combination with the authorized return 'to determine whether a rate of return prescription had been violated.' [footnote omitted.]

[12] *See Phase I Order*, 50 Fed. Reg. at 41,352 (para. 21).

[13] *American Tel. & Tel. Co. v. FCC*, 836 F.2d 1386, 1390 (D.C. Cir. 1988) (*AT&T v. FCC*). For a detailed discussion of *AT&T v. FCC*, *see MCI Liability Order*, 5 FCC Rcd at 221-223.

[14] *Id.*, 836 F.2d at 1392.

[15] These additional complaints are being dealt with in separate Section 208 complaint proceedings.

[16] The formal complaint against Bell Atlantic was filed by Allnet on August 21, 1991 and the formal complaint against The Cincinnati Bell Telephone Company (Cincinnati Bell) was filed on December 4, 1991. The formal complaint filed by Allnet against Cincinnati Bell was based on an informal complaint filed with the Commission on September 27, 1991. Pursuant to Section 1.718 of the Commission's rules, 47 C.F.R. § 1.718, a complainant may file a formal complaint with the Commission when the informal complaint has not been satisfied pursuant to Section 1.717 of the Commission's rules. Furthermore, the formal complaint will be deemed to relate back to the filing date of the informal complaint provided that the formal complaint "(a) is filed within 6 months from the date of the carrier's report, (b) makes reference to the date of the informal complaint, and (c) is based on the same cause of action as the informal complaint." 47 C.F.R. § 1.718. Defendant Cincinnati Bell alleges that the formal complaint was not timely filed because the informal complaint did not comply with Section 1.716 of the rules. Thus, the provisions of Section 1.718 would not apply and would not permit the formal complaint to relate back to the informal complaint filing date. Cincinnati Bell Answer at 9. We reject Cincinnati Bell's contention. Allnet's informal complaint meets the requirements of Section 1.716 of our rules, therefore, the formal complaint will relate back to the filing date of the informal complaint pursuant to Section 1.718.

the subject of this proceeding.[17] In October 1991, the Commission placed all pending rate of return complaints, including MCI's supplemental complaints for damages, in abeyance pending resolution of a related court remand in *Illinois Bell Tel. Co. v. FCC*.[18] Following the return of the proceedings to active status in December 1991 and the completion of discovery,[19] the parties to the various proceedings were required to submit initial briefs and reply briefs setting forth their respective claims and arguments.[20]

III. DISCUSSION

A. Procedural Issue

1. Contentions of the Parties

7. As a preliminary matter, Cincinnati Bell contends that its procedural rights have been unduly restricted in this proceeding.[21] First, Cincinnati Bell claims that Allnet failed to satisfy Section 1.722 of the Commission's rules by failing to identify within the allowable time period, with reasonable certainty, the amount of damages for which recovery is sought.[22] Second, Cincinnati Bell argues that the Commission's *Discovery Order* "sets a schedule for discovery not in accordance with any of its rules, and is unreasonable."[23] Cincinnati Bell claims that the Common Carrier Bureau *sua sponte* ruled certain discovery relevant without affording Cincinnati Bell opportunity to object, effectively ignoring its right to do so pursuant to Section 1.729 of the Commission's rules.[24] Further, Cincinnati Bell alleges that the time given by the Bureau to complete discovery was unreasonable because it did not afford Cincinnati Bell the opportunity to compel responses to interrogatories by Allnet that were relevant.[25] Finally, Cincinnati Bell states that the Commission has not even acknowledged that it is waiving its own rules, even though the Commission has the discretion to do so upon a showing of good cause.[26]

8. Allnet argues that Cincinnati Bell has been given more procedural rights than it is entitled to.[27] Allnet contends that in the present procedural structure, Cincinnati Bell is able to file an opposition to Allnet's brief setting forth damages, but Allnet is not given any opportunity to reply to that opposition. In contrast, Allnet argues, if a complaint for specific damages had been filed, Cincinnati Bell would have only been permitted to file an answer to the complaint, but Allnet would have had the additional opportunity to file a reply to Cincinnati Bell's answer. Therefore, Allnet claims that if any party's procedural rights have been restricted it is Allnet's, not Cincinnati Bell's. With regard to the discovery procedure, Allnet claims that Cincinnati Bell was given ample opportunity to discover all relevant information. Furthermore, Allnet states that Cincinnati Bell fails to identify any specific piece of information that it was denied, which was essential to its filing a complete brief and reply in a timely manner. Allnet argues that if Cincinnati Bell felt so prejudiced by the discovery schedule, it could have filed a motion for extension of time in which to file its initial brief.

2. Discussion

9. Cincinnati Bell's claims that its procedural rights have been unduly restricted in the instant proceeding are unavailing. Its argument that Allnet failed to plead damages with specificity in a timely manner as required by Section 1.722 of the rules is simply wrong. In establishing discovery and briefing schedules in this proceeding, we afforded both complainant and defendant ample opportunity to develop evidence and arguments on the issue of damages and liability.[28] We are satisfied that Allnet has presented its damage claims consistent with the *Discovery Order* and Section 1.722 of the rules. Moreover, under Section 208 of the Act, the Commission has considerable discretion to "investigate matters complained of in such a matter and by such means as it shall deem proper."[29] We are satisfied that Cincinnati Bell was afforded ample opportunity to develop relevant evidence and arguments to support its claims. In

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[17] The Commission will resolve Allnet's complaints covering the initial 1985-1986 monitoring period in a separate order.

[18] 911 F.2d 776 (D.C. Cir. 1990). *See* Allnet Communication Services, Inc. v. The Bell Atlantic Tel. Cos., Letter to Bell Atlantic (Oct. 3, 1991). The Commission acted on the remand in October 1991. *See* Amendment of Part 65 of the Commission's rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, CC Docket No. 86-497, 7 FCC Rcd 296 (1991), *appeal docketed sub nom. Illinois Bell Telephone Co., et al. v. FCC*, No. 90-1020 (D.C. Cir. Jan.11, 1991). On December 16, 1991, the Formal Complaints and Investigations Branch sent an Amended Notice of Complaint to Bell Atlantic that reactivated the case. *See* Allnet Communication Services, Inc. v. The Bell Atlantic Tel. Cos., Letter to Bell Atlantic (Dec. 16, 1991).

[19] Allnet Communication Services, Inc. v. The Bell Atlantic Tel. Cos., *et al.*, 7 FCC Rcd 4881 (Com.Car.Bur. 1992) (*Discovery Order*). Allnet and Bell Atlantic served interrogatories on each other on August 13, 1992. Allnet and Bell Atlantic each responded on September 2, 1992. Allnet and Cincinnati Bell served interrogatories on each other on August 13, 1992. They each responded on September 2, 1992. On September 11, Cincinnati Bell filed a motion to compel against Allnet. On September 14, 1992, Allnet filed a motion to compel responses to interrogatories against Bell Atlantic.

[20] Allnet and Bell Atlantic filed their briefs on September 22, 1992 (Allnet/BA Br. and Bell Atlantic Br.). Bell Atlantic filed its reply brief on October 2, 1992 (Bell Atlantic RBr.). Allnet filed its reply brief on October 7, 1992 (Allnet/BA RBr.). Allnet and Cincinnati Bell filed their briefs on September 22, 1992 (Allnet/CBT Br. and Cincinnati Bell Br.). Allnet filed an opposition to defendant's motion to compel on September 24, 1992. Cincinnati Bell filed a supplemental response to interrogatories on September 30, 1992. The parties filed their reply briefs on October 7, 1992 and Allnet filed a corrected reply brief to rectify numerous typographical errors on October 15, 1992 (Allnet/CBT RBr. and Cincinnati Bell RBr.). The revised reply brief of Allnet will supersede its original reply brief filed on October 7. On October 27, 1992, Cincinnati Bell filed a supplement to the record.

[21] Cincinnati Bell Br. at 32.

[22] *Id.* at 32-33.

[23] *Id.* at 33.

[24] *Id.*

[25] *Id.*

[26] *Id.* at 33-34.

[27] Allnet/CBT RBr. at 12-13.

[28] *Discovery Order*, 7 FCC Rcd 4881.

[29] 47 U.S.C. § 208(a).

the absence of any showing that the Bureau committed prejudicial error or unduly restricted Cincinnati Bell's development of its case, we find no merit in these claims.

B. Liability For Damages

1. Contentions of the Parties

10. Allnet alleges that the rates it paid for certain of the defendants' interstate access services during the period from January 1, 1987 through December 31, 1988 were unjust and unreasonable in violation of Section 201(b) of the Act, 47 U.S.C. § 201(b). Allnet supports its allegations with evidence taken from reports filed with the Commission by the defendants for the two year period at issue that show that defendants achieved earnings in excess of the Commission's prescribed rate of return on one or more of the three interstate access categories established for the purpose of enforcing that rate of return prescription.[30]

11. Allnet requests that the Commission declare that the defendant LECs' charges for the period from January 1, 1987 through December 31, 1988 are in violation of the rate of return prescription and Section 201(b) of the Act, and order the defendant LECs to pay damages to Allnet equal to the difference between the amount actually paid by Allnet for interstate access service during the period and the amount that Allnet would have paid if the defendants' charges earned no more than the maximum allowable rate of return, plus interest.

12. The defendants raise a number of issues that have been fully considered by the Commission in the *MCI Orders*. They will be briefly discussed below.

13. Defendants advance a variety of arguments that Allnet has failed to state a cause of action under the Act. Primarily, defendants argue that Allnet's claims are barred by *American Telephone and Telegraph Company v. FCC*.[31] These arguments take on several forms. Cincinnati Bell contends that after *Ohio Bell* not only is the automatic refund mechanism unlawful, but the end result of the mechanism is also unlawful.[32] Defendants also argue that by awarding amounts for overearnings the Commission would be effectively reinstating the invalid automatic refund scheme.[33] Defendants argue that the Commission must consider underearnings in determining whether particular overearnings are in violation of the Act.[34] Additionally, Bell Atlantic argues that it would be contrary to the court's ruling in *AT&T v. FCC* to award an amount based on earnings from individual access categories.[35] Bell Atlantic contends that any award of overearnings should come from overall access revenues and not from individual access categories earnings. Cincinnati Bell argues that rates charged in conformity with a lawfully filed tariff cannot then be found to be unjust and unreasonable merely because they later proved to be too profitable.[36]

14. Defendants also argue that the decision in *Ohio Bell*, issued after the release of the *MCI Liability Order*, requires dismissal of Allnet's complaints.[37] According to the defendants, *Ohio Bell* reaffirms the proposition established in *AT&T v. FCC* that the Commission cannot award damages for carrier overearnings without allowing the carrier to recoup or offset underearnings.[38]

15. In addition, Cincinnati Bell contends that because Allnet does not and cannot show that Cincinnati Bell acted or failed to act in a manner that is inconsistent with the Communications Act or the Commission's rules, a finding of liability would only be based on the imposition of a strict liability standard.[39] Cincinnati Bell claims that Allnet's contention of liability is untenable because Cincinnati Bell has fully complied with the Act and the Commission's rules. Cincinnati Bell also argues that the rates charged were not carrier-initiated, and therefore, there has been no violation of the Act or the rules.[40]

2. Discussion

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[30] The interstate access service categories are special access, common line, and switched traffic sensitive. *See* 47 C.F.R. § 65.702(b). Allnet states that the monitoring reports recite that for the period January 1, 1987 through December 31, 1988, Bell Atlantic earned a return of 13.26 percent in the switched traffic sensitive category and a return of 12.35 percent for all interstate access service; and Cincinnati Bell earned a return of 16.46 percent in the switched traffic sensitive category, a return of 12.78 percent in the special access category, and a return of approximately 14.06 percent for all interstate access service.

[31] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court invalidated the Commission's procedure to enforce its rate of return prescriptions through automatic refunds of carrier overearnings to customers. For a detailed discussion of *AT&T v. FCC*, *see MCI Liability Order*, 5 FCC Rcd at 221-223. The U.S. Court of Appeals for the Sixth Circuit, relying on *AT&T v. FCC*, vacated a Commission order that authorized refunds of earnings in excess of the authorized rate of return for the special access category over a period of years in the context of a strategic pricing investigation. *See Ohio Bell v. FCC*, 949 F.2d 864 (6th Cir. 1991) (*Ohio Bell*). The court primarily relied upon the statement from *AT&T v. FCC* that a rate of return prescription is both a minimum and a maximum prescription. *See AT&T v. FCC*, 836 F.2d at 1390. The Commission has clarified, however, that it does not view a rate of return prescription as both a maximum and a minimum and has stated that

> [o]ur accumulated experience with rate of return prescriptions, and our review of the cost of capital evidence in this proceeding, convince us that there is no such point. * * * We believe there is a substantial gap between an earnings level that is fully adequate to assure attraction of capital on favorable terms, and an earnings level which, if sustained over time, would be confiscatory.

Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, 5 FCC Rcd 7507, 7532 (1990), *appeal docketed sub nom. Illinois Bell Tel. Co., et al. v. FCC*, No. 90-1020 (D.C. Cir. Jan. 11, 1991).

[32] *See* Cincinnati Bell Reply at 5.

[33] *See* Bell Atlantic Br. at 2; Cincinnati Bell Br. at 15.

[34] *See* Cincinnati Bell Br. at 9-10; Bell Atlantic Br. at 10.

[35] Bell Atlantic Answer at 4.

[36] Cincinnati Bell Br. at 11-12.

[37] *See* Bell Atlantic Answer and Motion to Dismiss at 4; Bell Atlantic Br. at 6-7; Bell Atlantic RBr. at 4-5; Cincinnati Bell Br. at 9-10; Cincinnati Bell Motion to Dismiss at 9-10.

[38] Bell Atlantic Br. at 6-7; Bell Atlantic RBr. at 4-5; Cincinnati Bell Br. at 9-10; Cincinnati Bell Motion to Dismiss at 9-10.

[39] Cincinnati Bell Br. at 18-19. Cincinnati Bell argues that Allnet has failed to sustain its burden under Section 208 and to show that Cincinnati Bell has violated the Act.

[40] Cincinnati Bell Br. at 12. Cincinnati Bell contends that because its rates were computed pursuant to the Commission's formulas, and further, because the rates were subject to Commission review, its rates were effectively prescribed by the Commission. *Id.*

16. We have carefully examined the record before us and conclude that the defendants have cited no facts and have made no arguments here that would warrant a ruling contrary to the *MCI Orders*.

17. *Failure to State a Cause of Action:* In the *MCI Liability Order*, we rejected identical claims made by defendants and held that *AT&T v. FCC* establishes no precedent that bars an individual complainant from seeking a remedy under Section 208 of the Act for damages based on a carrier's reported overearnings.[41] We stated that

> we are not persuaded by defendants' claims that earning in excess of prescribed rate of return does not violate that Act or, if it does, that the Commission *is required* to take a carrier's underearnings as well as its overearnings into account in determining whether a violation has occurred.
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> * * *
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> We find that a valid prescription bound the defendants to a maximum earnings limitation, and the defendants admit that they earned in excess of the amount during the period in question.[42]

We found further that *AT&T v. FCC* did not pertain to Section 208 complaint proceedings. The Commission has the authority to order a carrier to pay damages if a complainant meets the burden of establishing both a violation of the Act and the actual injury.[43]

18. In addition, we have rejected the contention that rates charged in conformity with a lawfully filed tariff cannot be unjust and unreasonable.[44] We point out that the issue is not the lawfulness of high profits in the abstract, but the lawfulness of profits in excess of a prescription. Accordingly we hold that, taking into account the buffer, profits in excess of a prescription are unjust and unreasonable.

19. *AT&T v. FCC and Ohio Bell:* We disagree with the defendants' claim that *Ohio Bell* and *AT&T v. FCC* compel us to dismiss Allnet's complaints. As we emphasized in the *MCI Liability Order* and reaffirmed in the *MCI Damages Order*, automatic refunds and refunds ordered under Section 204 of the Act are different from individual actions for damages under Section 208. Unlike the automatic refund mechanism in *AT&T v. FCC* or the refund procedure in *Ohio Bell*, both of which resulted from rulemaking proceedings initiated at the Commission's discretion, individual actions for damages under Section 208 are initiated by private parties seeking damages for injuries to themselves; those private parties have the burden of establishing both a violation of the Act and actual injury.[45] The courts in *AT&T v. FCC* and *Ohio Bell* did not discuss private complaints for damages; they did not invalidate private actions for damages; and this analysis is not applicable to the different, separately authorized complaint procedure set forth in Sections 206-209. Accordingly, those decisions do not require us to depart from our holding in the *MCI Liability Order* that defendants have violated the Communications Act by earning in excess of a valid rate of return prescription, thereby making their rates unjust and unreasonable under Section 201 of the Communications Act and themselves liable for damages to the extent a complainant/customer can establish that it was damaged as a result of the violation.[46]

20. *Defendants' Other Arguments:* We also disagree with Cincinnati Bell's assertion that the Commission would be imposing a strict liability standard should we find liability and award damages. We conclude that it is clear that there has been a violation of the Communications Act and that Allnet has satisfied its burden of proving that such a violation has occurred. Thus, there has not and will not be a strict liability standard imposed on any party. Furthermore, we have previously rejected defendants' claim that access rates were not carrier-initiated and we have not been persuaded to alter that decision.[47]

C. Damages, Interest and Attorney's Fees Claims

21. Allnet's damages claims rest primarily on the contention that the proper measure of damages it incurred as a result of the defendants' rate of return prescription violations is the difference between the amounts it actually paid the defendants for interstate access services during the January 1, 1987 through December 31, 1988 monitoring period and the amount it would have paid if the defendants' rates produced earnings that did not exceed the Commission's prescription. The defendants, however, have raised a number of challenges to Allnet's damages claims, including a number of arguments that were previously considered and rejected by the Commission in the *MCI Liability Order* and the *MCI Damages Order*.[48] We address the parties' pertinent contentions below.

1. Damages

a. Contentions of the Parties

22. As referenced above, Allnet's damages claims rest primarily on the contention that the proper measure of the damages it incurred as a result of defendants' violations is the difference between the amount it actually paid defendants for interstate access services during the January 1,

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[41] *MCI Liability Order*, 5 FCC Rcd at 222-23.

[42] *MCI Liability Order*, 5 FCC Rcd at 223 (emphasis in original).

[43] *Id.* Cincinnati Bell contends that because the rate of return is prescribed on an overall basis, any damages awarded should be based only on an overall basis. Cincinnati Bell RBr. at 10, n.25. Further, Cincinnati Bell argues that if the Commission awards damages based on a category basis in this case, it should not award damages to be paid on an overall basis in another case. *Id.* We find that this argument has no merit because as we have stated before, these proceedings are based on individual complainants requesting specific, individualized damages. This is not a refund proceeding, and the Commission may award damages in one particular case based on overall access overearnings and award damages based on category overearnings in another.

[44] *MCI Liability Order*, 5 FCC Rcd at 222.

[45] *See MCI Liability Order*, 5 FCC Rcd at 222-23, para. 55.

[46] *Id.* at 226, para. 86.

[47] *Id.* at 223-24.

[48] The issues and arguments raised by Bell Atlantic and Cincinnati Bell in response to Allnet's claims are identical in their essentials. For the sake of convenience and clarity, we will refer to defendants' arguments as if they are part of the same pleading. To the extent that individual defendants raise separate or unique arguments, we will address them separately.

1987 through December 31, 1988 period and the amount it would have paid if the defendants' rates had produced earnings that did not exceed the Commission's prescribed rate of return.[49] In the *Discovery Order*, the Bureau stated that it tended to agree, in principle, that a possible measure of the damages stemming from defendants' rate of return violations could be that difference.[50] The Bureau was not persuaded on the record before it, however, that a damages determination based solely on such a measure necessarily reflected actual damages incurred by Allnet.[51] The defendants were invited to submit evidence that could serve to mitigate or otherwise reduce Allnet's damages claims. Specifically, the Bureau stated that evidence that would show that Allnet's share of excessive earnings realized in a particular access category by a defendant could be offset or otherwise reduced due to facts and circumstances surrounding Allnet's purchase of other interstate access services from such defendant for the relevant monitoring period might be relevant.[52]

23. Under its approach to calculating the damages, Allnet states that it should be awarded damages of $194,000 from Cincinnati Bell and $258,000 from Bell Atlantic, exclusive of interest.[53] Allnet states that the data underlying these calculations is taken from the defendants' FCC Forms 492, responses to discovery and other filings in these proceedings as well as Commission orders in tariff proceedings.[54] Although Allnet does not specifically describe its method in computing their damages, it does provide a chart providing its figures and its conclusions.[55] To derive the stated amounts, Allnet first calculates for each access service category, the amount that a defendant's earnings exceeded the rate of return prescription of 12 percent plus the .40 percent buffer. This is accomplished by multiplying the defendant's rate base by the difference between the defendant's actual rate of return (from the defendant's FCC Form 492[56] and the maximum allowable rate of return (including the .40 percent buffer) and then multiplying that amount by 2.[57] Next, Allnet computes its percentage share of the defendant's revenues for each access service category by dividing the amount billed per category to Allnet by defendant's revenues per access category.[58] Using this percentage, Allnet then computes its monetary share of the overearnings in a particular access category by multiplying the Allnet percentage of the defendant's revenues by the amount of overearnings for a particular category (which was previously computed).[59] Next, Allnet adjusts this amount for the effect of taxes. Finally, to this amount, Allnet adds a 15 percent "cost of money" charge in place of the actual interest rate for the monitoring period.[60] Thus, Allnet contends that it is owed $394,000 from Bell Atlantic and $254,000 from Cincinnati Bell.[61]

24. The defendants challenge Allnet's damages claims on a number of grounds, raising several arguments that were previously considered and rejected by the Commission in the *MCI Liability Order* and the *MCI Damages Order*. Defendants contend that by simply basing its damages claims on a calculation of Allnet's prorated share of category-level overearnings, Allnet asks the Commission to award it damages in the same amounts it would have received under the automatic refund rule invalidated by the court in *AT&T v. FCC*.[62] The defendants maintain that such a result is expressly precluded by *AT&T v. FCC*. Bell Atlantic adds that the decision in *Ohio Bell* precludes an award of damages based solely on category level overearnings.[63] Defendants also contend that the decisions in *AT&T v. FCC* and *Illinois Bell Tel. Co. v. FCC* [64] preclude an award of damages for past overearnings because those decisions limit the Commission to ordering prospective relief under Section 205 of the Act.[65]

25. Defendants next contend that, even if *AT&T v. FCC* and *Ohio Bell* do not preclude Allnet's damages claims, the claims still fail because Allnet's complaints do not establish a valid cause of action. According to Cincinnati Bell, to pursue a damages claim, Allnet must first show that the defendants charged unjust and unreasonable rates for interstate access services during the period in question, not that defendants' rates produced excessive returns in individual service categories.[66] Moreover, defendants argue, Section

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[49] In support of what it characterizes as the traditional approach to damages, Allnet cites to *Southern Pacific Co. v. Darnell-Taenzer Co.*, 245 U.S. 531 (1918) (*Darnell-Taenzer*) and the cases that followed this decision. Allnet/CBT RBr. at 9. In *Darnell-Taenzer*, the Court upheld an Interstate Commerce Commission (ICC) order requiring a carrier to pay reparations to a shipper in the amount that the rate charged by the carrier exceeded a rate found reasonable by the ICC. Allnet also cites Hughes Sports Networks, Inc. v. American Tel. & Tel. Co., 34 FCC 2d 691, 693-94 (1972), *recon. denied*, 38 FCC 2d 1052 (1972), for the proposition that the proper measure of damages where the injured party has paid an unlawful rate or charge is the difference between the amount paid and the reasonable rate. Allnet/CBT RBr. at 9-10.

[50] *Discovery Order*, 7 FCC Rcd at 4882, para. 7.

[51] *Id.*

[52] *Id.*

[53] These amounts, calculated by Allnet, do not reflect a 15 percent "cost of money" charge that Allnet claims it is due. *See* Allnet/BA RBr. at 8; Allnet/CBT Br. at 2. Allnet asserts that this cost of money charge is synonymous with the interest it believes it is due. *Id.*

[54] Allnet/CBT Br. at 2-3.

[55] *See, e.g.*, Allnet/BA RBr. Attachment 1.

[56] Allnet made adjustments to Cincinnati Bell's FCC Form 492 to reflect what it describes as excess deferred taxes that were improperly included in Cincinnati Bell's rate base.

[57] Allnet/BA RBr. Attachment 1, line 4.

[58] *Id.* Attachment 1, line 7.

[59] *Id.* Attachment 1, line 8.

[60] Allnet claims this cost of money because of the loss of the use of the overearned portion retained by the defendants. *See* Allnet/BA Br. at 2. The cost of money or "interest factor" was computed by multiplying the quotient of 15 percent by 12 months by 42 months or .525. Allnet/CBT RBr., Attachment A-1, n.3; Allnet/BA RBr., Attachment 1, n.3.

[61] In its complaint, Allnet requests that the Commission also award attorney's fees and costs. Allnet, however, does not cite any authority for such a request and does not address the request for attorney's fees and costs in its briefs.

[62] *See, e.g.*, Cincinnati Bell Br. at 22; Cincinnati Bell RBr. at 3-4, 7; Bell Atlantic Br. at 2-7. In addition, Cincinnati Bell contends that after *Ohio Bell* not only is the automatic refund mechanism unlawful, but the end result of the mechanism is also unlawful. Cincinnati Bell Reply at 5. *But see* Cincinnati Bell Br. at 10.

[63] Bell Atlantic Br. at 4; Bell Atlantic RBr. at 4-5.

[64] 966 F.2d 1478 (D.C. Cir. 1992) (*Illinois Bell*).

[65] *See, e.g.*, Bell Atlantic Br. at 5; Cincinnati Bell Br. at 17; Cincinnati Bell RBr. at 3.

[66] Cincinnati Bell Br. at 12-15; Cincinnati Bell RBr. at 2.

206 of the Act[67] requires Allnet to prove injury, causation, and the amount of damages in addition to establishing a violation of the Act.[68] Defendants maintain that by simply referencing defendants' earned rates of return for individual access service categories, Allnet has not only failed to allege any facts that would establish that defendants' rates were unjust and unreasonable during the period in question but has also failed to show that it sustained actual damage as a result of those rates.[69] Bell Atlantic contends that had its rates for a specific access service category been lower, the rates would have been lower for all carriers, including Allnet, and there would be no effect on Allnet's profits or losses.[70]

26. The defendants raise a number of arguments to support their claims that an award of damages to Allnet based on carrier overearnings is inappropriate as a matter of law. The defendants also claim that, in any event, damages should not be allowed for equitable and policy reasons. Both Cincinnati Bell and Bell Atlantic claim that the amounts sought by Allnet are in effect, refunds of tariffed charges, and that such refunds are prohibited by *AT&T v. FCC*.[71] The defendants argue that Allnet's reliance on *New England Tel. & Tel. Co. v. FCC* [72] as justification for the proposition that the Commission has the authority to order refunds as a remedy for earnings that exceed the permitted rate of refund is misplaced in light of *Illinois Bell* and *Ohio Bell*. First, Bell Atlantic argues that unlike the instant case, the refunds awarded in *New England* followed an investigation and suspension of rates pursuant to Section 204 of the Act.[73] Bell Atlantic contends that *Illinois Bell* mandates that the Commission must first suspend rates under Section 204 before ordering any refund. Second, Bell Atlantic claims that the value of *New England* is further decreased by the court of appeal's decision in *Ohio Bell*. According to Bell Atlantic, in light of *Ohio Bell* (which invalidated a Commission order requiring category-based refunds) *New England* does not address overearnings measured on particular categories of access services.[74] Bell Atlantic also argues that if the Commission determines that Allnet is entitled to damages in the amount of category overearnings, then the Commission should offset such an award by category underearnings.[75]

27. Cincinnati Bell argues that Allnet is actually seeking restitution or a refund of tariffed charges, not damages.[76] Cincinnati Bell also contends that Allnet has no valid claim for damages because Allnet has suffered no injury as a result of passing on the costs of interstate access to its customers.[77] Cincinnati Bell claims that Allnet has benefit-

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[67] 47 U.S.C. § 206.

[68] *See, e.g.*, Bell Atlantic Br. at 7-9; Bell Atlantic RBr. at 2-3; Cincinnati Bell Br. at 20-24; Cincinnati Bell RBr. at 2-8.

[69] *See, e.g.*, Bell Atlantic Br. at 7; Cincinnati Bell Br. at 21-22; Cincinnati Bell RBr. at 2, 5-6. Cincinnati Bell argues that Allnet has not attempted to establish a link between Cincinnati Bell's earnings and any damages that Allnet allegedly sustained, even though the burden of demonstrating a damages nexus is on Allnet. *Id.* Furthermore, Cincinnati Bell contends that even if such a nexus could be established, according to *Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221, 1235 n.34 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 920 (1981) (*ARINC*) and *Southern Ry. Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 455 (1979), *reh'g denied*, 444 U.S. 890 (1979) (*Seaboard*), the difference in rates or resultant earnings is not the measure of damages in a complaint case. *Id.* However, Cincinnati Bell's reliance on these two cases is misplaced. In *Seaboard*, the Court addressed the narrow question of whether there must be judicial review of the Interstate Commerce Commission's (ICC) decision not to conduct a Section 15(8)(a) investigation of a tariff. The Court held that judicial review was inappropriate because the shippers could pursue individual complaints under Section 13(1) of the Interstate Commerce Act and the decision not to investigate under Section 15(8)(a) did not prejudge the lawfulness of the tariff. As the Court noted, the ICC's decision not to investigate had only two consequences -- the burden to establish reasonableness is shifted from the carrier to the shipper and the shipper might not be entitled to the full amount of the overcharge because it must prove actual damages. *Seaboard*, however, does not stand for the proposition that refunds for overcharges and an award of damages are always necessarily two different amounts. In fact, the Court acknowledged that these amounts may be identical. *See* 442 U.S. 444, 455, n.8.

The U.S. Court of Appeals decision in *ARINC* similarly dealt with the reviewability of a Commission decision to accept a tariff. The court held that such action by the Commission is unreviewable since parties claiming to be aggrieved by the Commission's acceptance of a tariff may avail themselves of the statutory complaint procedure in Section 208 of the Act. The court echoed the Supreme Court's ruling in *Seaboard* that the burden is on the complainant in an individual complaint action, and the amount of damages may not necessarily be the same as the amount received had the Commission investigated the tariff, found the rates to be unreasonable, and ordered refunds.

Bell Atlantic argues that "[i]njury or damage are *not* shown merely by demonstrating that there is a difference between the amount actually paid by Allnet for access services in 1987-88 and the amount that Allnet would have paid if each of the Bell Atlantic telephone companies' service categories had earned within the zone of reasonableness established by the Commission." Bell Atlantic Br. at 7 (emphasis in original).

[70] Bell Atlantic Br. at 9. Bell Atlantic argues that if its rates for switched traffic sensitive services had been lower, then AT&T would have been required to reduce its rates, and because of market forces, Allnet would consequently be forced to reduce its rates to remain competitive. *Id.* Bell Atlantic claims that a reduction of access rates would not affect Allnet, and thus, Allnet would be unable to demonstrate any palpable injury or damage. *Id.*

[71] Bell Atlantic Br. at 2.

[72] 826 F.2d 1101 (D.C. Cir. 1987), *cert. denied*, 490 U.S. 1039 (1989) (*New England*).

[73] Bell Atlantic Br. at 5.

[74] *Id.* at 6. In *Ohio Bell*, the court stated: "[*New England*] does not address the issue of . . . whether a refund rule that requires refunds of overearnings but ignores underearnings is consistent with Commission policy in establishing rates of return." 949 F.2d at 873.

[75] Bell Atlantic Br. at 9. Bell Atlantic asserts that "Allnet cannot reasonably argue that it sustained measurable damages based on a theoretical calculation of what the rate should have been in one category without acknowledging that it also enjoyed a measurable benefit based on that same theoretical calculation applied to the other access categories." Bell Atlantic RBr. at 5. Bell Atlantic contends that the failure to offset category overearnings with category underearnings would penalize it for its "inability to *guarantee* that *each* of its service categories earned at the Commission's prescribed level, a fact which the Commission recognizes Bell Atlantic has no ability to control." *Id.* (emphasis in original; footnote omitted).

[76] Cincinnati Bell Br. at 17-18.

[77] *Id.* at 23-25; Cincinnati Bell RBr. at 7. Cincinnati Bell notes that the Commission has held that interexchange carriers necessarily pass through access charges to their customers. Cin-

ted from Cincinnati Bell's underearnings to a much larger degree than it has suffered from overearnings.[78] Cincinnati Bell argues that based on grounds of equity, any determination of damages must include consideration of other monitoring periods and allow underearnings to offset overearnings.[79]

28. Allnet counters that defendants' threshold arguments regarding the effect of the court's ruling in *AT&T v. FCC* and *Ohio Bell* are inapposite and have largely been rejected or precluded by the *MCI Liability Order*.[80] Allnet disputes defendants' suggestion that its earnings in the 1985-1986 monitoring periods are relevant to the issues in this proceeding, and urges that the argument for offsets from underearnings in other monitoring periods be rejected.[81] Allnet adds that defendants' arguments that it has failed to allege and prove violations of the Act and actual damage are unfounded because it has made a sufficient showing of each under traditional principles governing its statutory right to such relief.[82] According to Allnet, the only injury and causation it need show are the injury and causation arising from its payment of excessive rates for services it purchased from defendants during the relevant period.[83] Allnet maintains that it has shown that defendants charged rates that produced earnings in excess of the Commission's prescribed rate of return and argues that its damages are the excessive charges that Allnet paid. Moreover, Allnet claims that the burden is on defendants to show that the full overcharges should not be recovered as damages and that they have failed to meet this burden.[84]

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cinnati Bell Br. at 24 (citing Teleconnect Co. v. Bell Tel. Co. of Pennsylvania, 6 FCC Rcd 5202 (1991); Long Distance USA, Inc. v. Bell Tel. Co. of Pennsylvania, 7 FCC Rcd 408 (1992)). Cincinnati Bell argues that Allnet has not been damaged in any amount it paid to Cincinnati Bell because it recouped such amounts directly from its customers. *Id.* at 24-25 (citing *Obron v. Union Camp Corp.*, 477 F.2d 542 (6th Cir. 1973; *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir. 1971), *cert. denied*, 404 U.S. 871 (1971)). Cincinnati Bell cites the above cases for the proposition that "[a] reseller who directly passes on any increased costs to his own customer is not injured." Cincinnati Bell Br. at 25, n.50.

[78] *Id.* at 24. Cincinnati Bell claims that it has underearned in every monitoring period since October 1985, with the exception of the 1987-1988 monitoring period. *Id.* at 25. Therefore, Cincinnati Bell argues, if their earnings for all periods since October 1985 are taken into account, Allnet has been "undercharged" a net amount of $74,382. *Id.* Cincinnati Bell provides an exhaustive description of how this undercharge was computed. *See* Cincinnati Bell Br. at 25-28.

[79] Cincinnati Bell RBr. at 9. Cincinnati Bell disputes Allnet's computation of its damages claiming that Allnet failed to compute its market share percentage on a total interstate basis. *Id.* Accordingly, Cincinnati Bell contends that all of Allnet's damages computations are incorrect. Moreover, Cincinnati Bell disputes Allnet's claim that $760,000 in excess deferred taxes must be deducted from Cincinnati Bell's revenue requirement in order to make Cincinnati Bell's FCC Form 492 accurate. *See infra* note 56. Cincinnati Bell states that the FCC Form 492 reflects Cincinnati Bell's actual, not projected, revenue requirement. Cincinnati Bell also states that it has settled on actual figures with the National Exchange Carrier Association (NECA), and thus, Cincinnati Bell's carrier common line revenue requirement as provided on its FCC Form 492 appropriately does not include an adjustment for the disallowed excess deferred taxes.

[80] *See* Allnet/BA RBr. at 2; Allnet/CBT RBr. at 3. First, Allnet states that the instant proceeding is a complaint case for damages under Sections 206-209 of the Communications Act and not an automatic refund case as considered in *AT&T v. FCC* and *Ohio Bell*. Allnet/BA RBr. at 2. Second, Allnet contends that unlike the schemes considered in *AT&T v. FCC* and *Ohio Bell*, Allnet is seeking access category overearnings while the defendants have the opportunity to show offsetting category underearnings. *Id.* Third, Allnet argues that the premise of the automatic refund cases that the rate of return prescription is both a maximum and a minimum for refund purposes is incorrect in this situation. Allnet states that it is only seeking damages based on overearnings on access services it purchased from defendants, while affording the opportunity for defendants to offset overearnings with underearnings in other access categories. *Id.* at 3.

In its brief, Allnet incorporates by reference the arguments with regard to the damages issues made by MCI Telecommunications Corp. in MCI Telecommunications Corp. v. Pacific Bell Tel. Co., File No. E-88-46. *See* Allnet/BA Br. at 2, n.2.

[81] Allnet/BA RBr. at 3; Allnet/CBT RBr. at 10. Allnet argues that damages incurred in the 1987-1988 monitoring period cannot reasonably be set off by alleged underearnings from a different monitoring period because the customers who purchased services in one period did not necessarily purchase services in another. *Id.* Moreover, Allnet claims that "taken to its logical conclusion, a standard of damages based on the sum of *all* overcharges and undercharges for *all* monitoring periods (from here to eternity) would effectively bar any damages from ever being assessed for overearnings -- the net amount of damages could not be determined until the Defendant ceased to offer services to any person." *Id.* at 4.

Allnet argues that Cincinnati Bell's reliance on *AT&T v. FCC* as authority for "offsets to eternity" is misplaced. Allnet argues that the language quoted by Cincinnati Bell assumes that the refund mechanism is based on a carrier earning precisely the prescribed rate of return from one two year period to the next. Allnet argues that such is not the case here.

> Allnet is only requesting damages in excess of 12.4% rate of return for overearning services offset by earnings *below that* (12%) amount for the 1987-1988 period. Thus, CBT [Cincinnati Bell] need not have earned 'precisely the prescribed rate of return' for the 1987-1988 period, it need only have come reasonably close to it.

Allnet/CBT RBr. at 11 (emphasis in original; footnotes omitted).

[82] Allnet/BA RBr. at 4.

[83] *Id.* at 4-5 (citing *MCI Liability Order*, 5 FCC Rcd at 226).

[84] Allnet/BA RBr. at 6; Allnet/CBT RBr. at 9. Allnet disputes Bell Atlantic's argument that if Bell Atlantic had charged lower rates to AT&T and Allnet, Allnet would have been no better off than it would have been had the overcharges occurred. Allnet/BA RBr. at 6. Allnet finds four major flaws with Bell Atlantic argument. First, Allnet contends that Bell Atlantic's premise that if lower rates were charged to all interstate customers, it follows that AT&T would have flowed through those lower rates is incorrectly based on a 1989 price cap order. *Id.* Allnet contends that nothing in the price cap order stands for this proposition, and furthermore, even under the price cap regime, AT&T is not required to flow through access charge reductions. Second, Allnet argues that Bell Atlantic's assumption that when AT&T does flow through lower access charges, they do so on a uniform basis, affecting all services equally is highly speculative. *Id.* at 7. Third, Allnet states that Bell Atlantic's premise that if AT&T reduces it rates, Allnet must reduce its rates is simply wrong. Allnet states that AT&T and Allnet do not compete directly with each other, and that Allnet targets smaller, market niches. Finally, Allnet summarizes Bell Atlan-

29. Allnet also strongly disputes Cincinnati Bell's claim that it has complied with the Commission's rate of return prescription and other relevant Commission rules.[85] Allnet states that Cincinnati Bell has admitted miscalculating its rates for the 1987-1988 period and blames its error on its failure to understand the impact of the Commission's revisions to its Part 32 Uniform System of Accounts.[86] Allnet argues that had Cincinnati Bell complied with the Commission's rules and procedures, it would have filed a set of lower rates for the three months remaining at the end of the 1987-1988 monitoring period. Allnet would have paid the lower rates, and Cincinnati Bell's investors would have earned an amount closer to their allowed 12 percent rate of return.[87] Allnet contends that Cincinnati Bell's analysis fails to recognize that the challenge here is that unjust and unreasonable rates were in effect, rates that violated the Communications Act.[88] Allnet argues that wilful intent on the part of the carrier is not a necessary pre-condition for finding liability for unlawful rates under Section 201(b) of the Act.[89]

30. Allnet challenges Cincinnati Bell's reliance on *Illinois Bell* as a basis for claiming that refunds are only permitted after rates have been suspended under Section 204 of the Act.[90] Allnet contends that Section 206 provides for an award of damages (including interest) to a complainant for any act or omitted act required to be done by the Communications Act. Allnet adds that the case law specifically provides for damages due to overcharges, even if the rates at issue have taken effect without any investigation or suspension.[91] Allnet states that Cincinnati Bell fails to cite any cases that bar damages for unlawful rates under a Section 208 complaint. Finally, Allnet asserts that Cincinnati Bell failed to comply with the Communications Act by failing to file rates that achieved a reasonable rate of return.[92]

b. Discussion

31. *AT&T v. FCC and Ohio Bell:* The defendants' claims that the holdings in *AT&T v. FCC* and *Ohio Bell* control these proceedings and bar an award of damages to Allnet are without merit for the reasons stated in the *MCI Liability Order*. We emphasized in that Order that the court in *AT&T v. FCC* explicitly acknowledged the Commission's authority to order a carrier to disgorge earnings in excess of a rate of return prescription,[93] finding only the remedy component of the Commission's rate of return prescription (the automatic refund mechanism) to be unlawful.[94] More to the point, we emphasized that "the [*AT&T v. FCC*] opinion does not address Section 208 complaint proceedings nor purport to alter the statutory scheme of the Act or the remedies Congress established therein."[95] Similarly, as we stated in the *MCI Damages Order*, the *Ohio Bell* decision does not expand upon *AT&T v. FCC* and does not address the Commission's authority to award damages in private complaint actions under Section 208 of the Act.[96]

32. *Illinois Bell:* We also reject defendants' claim that the decision in *Illinois Bell* somehow leaves the Commission only with Section 205 authority in the face of a violation of our rate of return prescription. As we explained in the *MCI Damages Order, Illinois Bell* addresses the Commission's authority under Section 204, not Section 208.[97] The defendants' claim that the *Illinois Bell* decision deprives the Commission of authority to award damages for violations of a valid rate of return prescription has no merit.

33. *Section 201(b) of the Act:* We turn now to the defendants' contention that Allnet's damages claims must be dismissed because Allnet has failed to prove defendants' rates were unjust and unreasonable within the meaning of Section 201(b) of the Act. In the liability section above, we held that the complainant met its burden of proof by establishing that the defendants violated our rate of return prescription.[98] Accordingly, the question before us now is not whether defendants' rates were unjust and unreasonable; rather the questions now are whether the complainant suffered any measurable damage as a consequence of paying rates previously determined by the Commission to be unlawful under Section 201(b).[99]

34. *Damages and Offsets:* The defendants' arguments are devoted primarily to attempting to persuade the Commission that Allnet's damages claims are really claims for restitution or refunds governed by equitable or public policy considerations. These considerations, according to defendants, militate against any award of damages to Allnet based on excessive earnings. The defendants argue, in ef-

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tic's prior position in this case, specifically, that the amounts AT&T is charged are irrelevant to its damages or liability to Allnet, and therefore, Allnet contends that if rebates of tariffed rates to AT&T are irrelevant to this proceeding, then so are the rates themselves. *Id.* at 8.

[85] Allnet/CBT RBr. at 5. Allnet claims that the Commission has found that Cincinnati Bell improperly included $760,000 in excess deferred taxes in its 1988 carrier common line revenue requirement. Allnet/CBT Br. at 3, citing to Annual 1988 Access Tariff Filings, 4 FCC Rcd 4115 (1988) (Phase II), *recon.*, 4 FCC Rcd 3965 (1989), *further recon.*, 4 FCC Rcd 7906 (1989); *see also* Allnet Communication Services, Inc. v. Nat'l Exchange Carrier Ass'n, *et al.*, 6 FCC Rcd 2608 (1991), *recon. denied*, 6 FCC Rcd 5663, *appeal pending sub nom. Allnet Communication Services, Inc. v. FCC*, No. 91-1562 (D.C. Cir. filed Nov. 19, 1991). Allnet argues that to correct Cincinnati Bell's FCC Form 492, an adjustment should be made by subtracting the disallowed amount from the carrier's expenses. *See supra* note 56.

[86] *Id.* (citing Cincinnati Bell Br. at 14-15).

[87] Allnet/CBT RBr. at 6.

[88] *Id.*

[89] *Id.*

[90] *Id.* at 7.

[91] *Id.* (citing *Maine Public Advocate v. FCC*, 828 F.2d 68, 70 (1st Cir. 1987)).

[92] *Id.* at 7-8.

[93] *AT&T v. FCC*, 836 F.2d at 1392 ("Thus, as we previously have concluded, the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate of return prescription").

[94] Indeed, the court in *Ohio Bell* recognized the continuing efficacy of our rate of return framework. *See* 949 F.2d at 868.

[95] *MCI Liability Order*, 5 FCC Rcd at 223, para. 56.

[96] *MCI Damages Order* at para. 26.

[97] *Id.* at para. 27.

[98] In the *MCI Liability Order*, we held that the complainant therein could prove that defendants' rates were unjust and unreasonable by proving that the defendants violated our rate of return prescription. *See MCI Liability Order*, 5 FCC Rcd at 226.

[99] Allnet's contention that Bell Atlantic, by settling with other rate of return complainants, has discriminated in violation of Section 202(a) of the Act is also unavailing. Allnet has provided no authority for its contention that Section 202 of the Act governs the terms and manner of a carrier's resolution of Section 208 disputes with its customers.

fect, that the damages Allnet seeks are equivalent to refunds that would have been required under the refund mechanism invalidated by the court in *AT&T v. FCC*. We do not agree. We are concerned here with determining whether a particular customer, which has availed itself of a statutory complaint remedy under Title II of the Act, has sustained any measurable damage that can be traced to defendants' violations of the Act. Although a damages award under Section 208 of the Act might well be equal or substantially similar to a refund ordered under Section 204 of the Act,[100] this does not transform a private complaint action into a public enforcement proceeding subject to broad public interest considerations.

35. As in the *MCI Damages Order*, we find defendants' arguments with respect to "passing-on" equally unavailing. In rejecting this same argument, we said, "[w]hether [complainant] passed on the overcharges or absorbed them does not alter the fact that the defendants overcharged [complainant] in violation of a binding rate of return prescription and must answer for such violations."[101] The issue is not what Allnet has done in response to paying excessive rates, but whether Allnet has been damaged as a result of these excessive rates.[102]

36. Nor can we accept the defendants' related claim that we should require Allnet to flow through any damages it may receive to its end user customers. Sections 206-209 of the Act give private parties the right to file complaints challenging the acts or omissions of carriers and to recover monetary damages resulting from such acts or omissions. Complainants, however, are charged, as Allnet is in the instant case, with the burden of establishing violations of the Act or Commission rule or order and the amount or extent of damage suffered as a consequence of such violations. Accepting defendants' flow through argument would, in effect, transform Allnet's complaints into class action suits on behalf of its customers, a result neither expressly contemplated by nor consistent with the private remedy created under Sections 206-209 of the Act.

37. We also reject CBT's argument that we should allow CBT to offset AT&T's damages claims with underearnings attributable to AT&T billings outside the 1987-1988 monitoring period. CBT has provided no support or rationale for its contention that we should take into account AT&T's purchases of interstate access services outside the relevant 1987-88 monitoring period in assessing the damages incurred by AT&T as a result of paying CBT's 1987-1988 rates.

38. We have carefully reviewed the arguments and evidence presented by the parties and believe that some offsets of the claimed damages amounts is appropriate. In the *MCI Liability Order*, we specifically rejected claims by the defendants that the Commission is required to take a carrier's interstate access underearnings as well as overearnings into account in determining whether a violation of the Act has occurred because this would be at odds with established case law.[103] However, we stated in the *MCI Damages Order* that it is appropriate to consider defendants' underearnings in assessing complainant's damage or injury resulting from defendant's overearnings in a particular monitoring period.[104] The parties have made no argument which persuades us to alter our holdings.

39. Based upon our decision regarding the computation of damages here, we award damages to Allnet from Bell Atlantic in the amount of $168,000.[105] In reaching this amount, we have accepted Allnet's calculation of Bell Atlantic's base overearnings as $258,000 for the switched traffic sensitive category. We note that Bell Atlantic and Allnet agree on the base overearnings amount. We reject, however, Allnet's computation of underearnings using 11.6 percent as the percentage to compute underearnings in an access category.[106] The Commission set carriers' rates of return for the 1987-1988 monitoring period at 12 percent. We have allowed the offset of undercharges in the common line and special access categories totalling $92,000.

40. We award damages to Allnet from Cincinnati Bell in the amount of $166,000.[107] In reaching this amount, we have accepted Allnet's calculation of Cincinnati Bell's

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[100] *See Seaboard*, 442 U.S. 444, 455, n.8:

> If a shipper proves a rate is unreasonable and that he was damaged in the full amount he was overcharged, the outcome of a § 13(1) [§ 208] proceeding will be no different than that of a § 15(8)(a) [§ 204] proceeding in which the carrier fails to establish the reasonableness of the rate.

[101] *MCI Damages Order* at para. 31.

[102] While defendants have asserted that lower charges to complainant would have resulted in lower charges to complainant's customers, they have provided no persuasive evidence in support of this contention.

[103] *MCI Liability Order*, 5 FCC Rcd at 223, paras. 59-60, citing *Nader v. FCC*, 520 F.2d 182, 201 (D.C. Cir. 1975). *See also New England Tel. & Tel. Co. v. FCC*, 826 F.2d 1101 (D.C. Cir. 1987), *cert. denied*, 490 U.S. 1039 (1989); and *AT&T v. FCC*.

[104] *MCI Damages Order* at para. 38. We note that Bell Atlantic requests an offset of the damage award by an amount it claims it is owed by Allnet for invoiced charges. We will not allow an offset for the disputed charges because the Commission lacks the authority under Section 208 of the Act to resolve billing and collection disputes of this nature.

[105] This amount is calculated as follows:

$ 258,000 (overcharges)

- 75,000 (undercharges - common line category)

- 15,000 (undercharges - special access category)

$ 168,000 Damages

We note that Bell Atlantic makes a mathematical error in the calculation of its category underearnings. *See* Response of the Bell Atlantic Telephone Companies to the Request for Additional Discovery of Allnet Communication Services, Inc., Attachment 2.

[106] Allnet/BA RBr. at 1-2, 3, Attachment 2. Allnet claims that the method for computing damages originally set forth by Allnet is biased in favor of Bell Atlantic. *Id.* at 3. Allnet claims that a "truly symmetric scheme" would offset overearnings using only deficiencies below 11.6 percent, or .4 percent below the 12 percent rate of return.

[107] This amount is calculated as follows:

$ 6,000 (overearnings - common line category)

+ 148,000 (overearnings - switched traffic sensitive category)

+ 12,000 (overearnings - special access category)

$ 166,000 Damages

overearnings as $166,000 for the switched traffic sensitive, common line, and special access service categories.[108] We reject Cincinnati Bell's formula for computing Allnet's market share percentage.[109] Cincinnati Bell's contention that Allnet's market share percentage should be computed on a total interstate basis rather than on an access category basis is incorrect. Allnet has alleged that Cincinnati Bell has violated the rate of return prescription on a per category basis, therefore, it is necessary and appropriate to calculate Allnet's purchases of access services on a per access category basis. Cincinnati Bell is not entitled to any offsets because it had no category underearnings.

2. Interest and Attorney's Fees

a. Contentions of the Parties

41. Defendants' final claim is that Allnet is not entitled to prejudgment interest should the Commission award damages to Allnet. Defendants contend that while the Commission may award interest under Section 204 of the Act, there is no provision for the award of interest under Section 206 of the Act.[110] Defendants maintain that this is not a Section 204 proceeding, and in any case, defendants allege that the Commission has failed to follow Section 204 procedures.[111] Defendants both argue that based on well settled principles of equity, interest is inappropriate in this case. Bell Atlantic grounds its claim on its contention that the amount of damages has been sharply disputed in these proceedings.[112] Bell Atlantic claims that interest would penalize it even though it has not been accused of deliberate wrongdoing and interest is not necessary to make Allnet whole because Allnet would have passed through costs to its customers.[113] In addition, Bell Atlantic argues that, should interest be awarded, it should accrue from the date on which it filed its final Form 492 report as the Commission has held that this is the point at which Allnet is chargeable with the discovery of the facts on which its claim is based.[114]

42. Cincinnati Bell argues that an award of interest in this case is inappropriate because (1) damages are neither liquidated nor easily ascertainable,[115] (2) there has been no showing of bad faith,[116] or (3) exceptional circumstances have not been proven.[117] Moreover, Cincinnati Bell maintains that the burden is on the complainant to prove that damages are due, and in the instant case, there has been no such showing. In addition, Cincinnati Bell claims that Allnet has benefitted from underearnings in other monitoring periods, and therefore, interest on any damages is improper because Allnet has suffered no harm. Cincinnati Bell argues that the rate proposed by Allnet is "ridiculously high" and "absurd."[118] Finally, Cincinnati Bell argues that Allnet has established no basis for its request for attorney's fees.[119] Cincinnati Bell states that Allnet has failed to show any bad faith on the former's part, either in charging the filed rates in question or in defending the allegations of the instant complaint.

43. Allnet argues that defendants fail to recognize that Section 206 of the Act provides for full damages, including attorney's fees.[120] Allnet contends that it was damaged due to the loss of use of the money caused by the overcharges, therefore warranting the award of interest at the rate of Allnet's cost of money. With regard to Bell Atlantic's con-

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The damages amount was calculated using Allnet's figures from its revised simple overearnings calculations which were supplemented by data provided to Allnet by Cincinnati Bell in its Supplemental Response filed September 30, 1992. The data provided reduced Allnet's billed revenues, and in turn, reduced Allnet's market share percentage. *Compare* Allnet/CBT RBr. Attachment A-1 *with* Allnet/CBT Br. Attachment A-1.

[108] Allnet's contention that $760,000 in excess deferred taxes must be disallowed from Cincinnati Bell's expenses has previously been considered and rejected by the Commission. Allnet Communication Services, Inc. v. Nat'l Exchange Carrier Ass'n, *et al.*, 6 FCC Rcd 2608, 2610 (1991) (*Allnet v. NECA*), *recon. denied*, 6 FCC Rcd 5663, *appeal pending sub nom. Allnet Communication Services, Inc. v. FCC*, No. 91-1562 (D.C. Cir. filed Nov. 19, 1991). In CC Docket No. 88-1, the Commission investigated a number of issues relating to the LECs' Annual 1988 Access Tariff Filings. Annual 1988 Access Tariff Filings, CC Docket No. 88-1, Phase II, 4 FCC Rcd 4115 (1988) (*December 27 Order*), *recon.*, 4 FCC Rcd 3965 (1989) (*April 27 Recon. Order*), *further recon.*, 4 FCC Rcd 7906 (1989), *appeal dismissed sub nom. Southern Bell Tel. & Tel. Co. v. FCC*, No. 89-1081 (D.C. Cir. Nov. 12, 1991). In the *December 27 Order*, we disallowed certain projected revenue requirements associated with inside wire installation and maintenance and excess deferred taxes. The deferred tax disallowances directly affected carrier common line (CCL), traffic sensitive and special access charges. In the *April 27 Recon. Order*, we reexamined each disallowance questioned on reconsideration. In the order, we reaffirmed certain disallowances for excess deferred taxes, but we also concluded that a number of defendants, including Cincinnati Bell, were able to show that the rates during the period in question were not unjust or unreasonable notwithstanding the excess deferred taxes because their actual 1988 revenue requirements were understated by a sufficient amount to offset or compensate for the disallowances stated in Appendix C of the *April 27 Recon. Order*. *Allnet v. NECA*, 6 FCC Rcd at 2610, para. 13. Specifically, with respect to the CCL component of excess deferred taxes disallowances, we found that NECA's showing that actual revenue requirements for 1988 exceeded the projected amount by $28 million, more than offsetting the total amount of potential CCL refund liability shown in Appendix C of the *April 27 Recon. Order*, rebutted the evidentiary basis of Allnet's complaints insofar as Allnet sought to recover deferred tax disallowances through CCL rate refunds from the defendants. Cincinnati Bell was represented by NECA in that particular proceeding.

[109] *See* Cincinnati Bell RBr. at 9.

[110] Bell Atlantic Br. at 11; Cincinnati Bell Br. at 30.

[111] *Id.*

[112] Bell Atlantic Br. at 13. Bell Atlantic argues that based on the *MCI Discovery Order*, interest is inappropriate when damages are not ascertainable with sufficient certainty before judgment. *Id.* at 12.

[113] *Id.*

[114] Bell Atlantic Br. at 14 (citing *MCI Liability Order*, 5 FCC Rcd at 216, para. 78). Bell Atlantic also argues that the Commission should not calculate the interest according to the Commission's Order in Docket No. 84-800. Bell Atlantic argues that this would be inconsistent with *AT&T v. FCC*. Bell Atlantic Br. at 13. Furthermore, Bell Atlantic contends that if interest is to be awarded, it should added on after overearnings are offset by any underearnings. Bell Atlantic RBr. at 6.

[115] Cincinnati Bell Br. at 31.

[116] *Id.*

[117] *Id.*

[118] Cincinnati Bell RBr. at 11.

[119] *Id.* at 32.

[120] Allnet/CBT RBr. at 11-12.

tentions, Allnet argues that an award of interest would not be punitive because Bell Atlantic would simply be paying the cost of money for the time it had access to these funds.[121] Allnet disputes Bell Atlantic's argument that interest is inappropriate because Allnet sustained no damages based on Bell Atlantic's assumption that lower access charges to Allnet would have resulted in lower rates to its customers.[122] Allnet argues that this assumption is highly speculative and is incorrect. Finally, Allnet contends that damages were ascertainable with sufficient certainty because Bell Atlantic was aware of the rate of return prescription and knew that earnings in excess of the prescription were at risk. Allnet argues that Bell Atlantic knew what the "outer limits" of its liability could be and should be required to pay interest on amounts below such a ceiling.

b. Discussion

44. *Interest:* Defendants' claim that the Commission lacks the requisite authority to award interest in a Section 208 common carrier complaint proceeding has no merit. Although an award of interest does not fall squarely within the ambit of Section 208 of the Communications Act, our authority under Sections 4(i) and other sections of the Act to award interest in a common carrier complaint case is well established.[123] In deciding whether to award interest in a particular common carrier complaint case we are generally guided by federal court practice, where the award of prejudgment interest " . . . is a matter left to the sound discretion of the trial court."[124] The award of interest in a common carrier complaint case is thus guided by considerations of fairness. Applying this standard, we are persuaded that an award of interest is appropriate in this case. Allnet was effectively deprived of the use of the excessive amounts it paid the defendants as a result of their unlawful rates while the defendants, on the other hand, enjoyed the beneficial use for a substantial period of time of funds to which Allnet rightfully has a claim. We are persuaded that interest is required not only to effect a full and fair remedy for Allnet, who paid rate higher than it would have paid had defendants earned within the prescribed level, but also to avoid any unjust enrichment of defendants stemming from their charging rates that we have determined to be unjust and unreasonable under Section 201(b) of the Act.[125] However, we reject Allnet's claim that the appropriate rate of interest is its 15 percent "cost of money." Allnet has provided no persuasive argument to support its claim that its cost of money is the proper measure of interest. Moreover, Bell Atlantic's reliance on an interest rate of 12 percent in the computation of its overearnings and underearnings is also incorrect. We agree with the contention of Bell Atlantic, however, that the interest rate set forth in the CC Docket No. 84-800 proceeding is inappropriate in the instant proceeding.[126] Just as the courts' decisions regarding the validity of the rate of return mechanism and refunds under Section 204 of the Act do not guide us in this Section 208 proceeding, we are similarly not bound by interest rate computations prescribed in CC Docket No. 84-800. We conclude that interest should be computed at the IRS rate for tax refunds.[127] In addition, we find that interest should begin to accrue from January 1, 1989, the day after which the 1987-1988 monitoring period ended. At that point, Bell Atlantic and Cincinnati Bell were subject to the earnings limitations of a new monitoring period. Accordingly, we award interest calculated at the IRS rate for tax refunds [128] from the Bell Atlantic Telephone Companies and Cincinnati Bell Telephone Company to Allnet Communication Services, Inc. from January 1, 1989 until the date of full payment to Allnet.

45. *Attorney's Fees:* In its complaint, Allnet requests that the Commission award reasonable attorney's fees and costs in addition to any damage award. In light of prior Commission decisions, we cannot award attorney's fees or costs to Allnet.[129]

IV. CONCLUSION

46. We have carefully reviewed the extensive record before us and have found, to the extent indicated here, that complainant is entitled to an award of damages, plus accumulated interest on such damages amount, for the Bell Atlantic Telephone Companies' and Cincinnati Bell Telephone Company's violations of our rate of return prescription for the 1987-1988 monitoring period.

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[121] Allnet/BA RBr. at 8. Allnet notes that paying interest on refunds is routine and codified in Bell Atlantic's interstate tariffs.

[122] *Id.* at 8-9.

[123] *See* MCI Telecommunications Corp. v. American Tel. & Tel. Co., *et al.*, 94 FCC 2d 332, 343-46 (1983).

[124] *United States v. California Board of Equalization*, 650 F.2d 1127, 1132 (9th Cir. 1981), *aff'd*, 456 U.S. 901 (1982), *reh'g denied*, 456 U.S. 985 (1982).

[125] *See New England Telephone and Telegraph Co. v. FCC*, 826 F.2d 1101, 1113 (D.C. Cir. 1987), *cert. denied*, 109 S. Ct. 1942 (1989) (carriers may reasonably be required "to pay full interest for earnings they had no right to retain in the first place.").

[126] Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985) (*Phase I Order*), *on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,033 (Apr. 1, 1986) (*Phase I Reconsideration*), *on further reconsideration*, 2 FCC Rcd 190 (1987).

[127] *See MCI Damages Order* at para. 45. We believe that the rationale adopted by the Commission for applying the IRS rate in pole attachment complaint proceedings under Section 204 of the Act, 47 U.S.C. § 204, is equally applicable here. In Teleprompter of Fairmont v. C&P of West Virginia, 79 FCC 2d 232 (1980), the Commission stated

> As a matter of fairness, we believe that the rate of interest applied in a pole attachment complaint proceeding should be readily available, easily applied, and periodically revised to reflect changes in borrowing costs. In light of these considerations, we find the interest rate for federal tax refunds and additional tax payments suitable for use in this type of proceeding. This rate appears in a variety of easily obtained official and commercial publications, and is revised on a regular basis. [footnote omitted.]

[128] The applicable IRS rates are set forth in Appendix A.

[129] *Turner v. FCC*, 514 F.2d 1354 (D.C. Cir. 1975).

V. ORDERING CLAUSES

47. Accordingly, IT IS ORDERED, pursuant to Section 4(i), 4(j), 201, 206, 207, 208 and 209 of the Communications Act, as amended, 47 U.S.C. §§ 4(i), 4(j), 201, 206, 207, 208 and 209, that the above-captioned complaints filed by Allnet Communication Services, Inc. ARE GRANTED to the extent discussed here.

48. IT IS FURTHER ORDERED that the Bell Atlantic Telephone Companies SHALL PAY to Allnet Communication Services, Inc. the sum of $168,000 (One hundred and sixty-eight thousand dollars) 60 days after the release of this Memorandum Opinion and Order; and that Cincinnati Bell Telephone Company SHALL PAY to Allnet Communication Services, Inc. the sum of $166,000 (One hundred and sixty-six thousand dollars) 60 days after the release of this Memorandum Opinion and Order.

49. IT IS FURTHER ORDERED that the Bell Atlantic Telephone Companies and Cincinnati Bell Telephone Company SHALL PAY interest on the amount of damages assessed, using applicable IRS rates found in Appendix A, from January 1, 1989 until the date of full payment to Allnet Communication Services, Inc.

50. IT IS FURTHER ORDERED that the Motion to Dismiss filed by Cincinnati Bell Telephone Company on January 21, 1992 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Effective Period	Rate	Internal Revenue Service Citation
01/01/87 - 03/31/87	8%	Rev.Rul. 146, 1986-2 C.B. 208
04/01/87 - 06/30/87	8%	Rev.Rul. 87-23, 1987-13 I.R.B. 46
07/01/87 - 09/30/87	8%	Rev.Rul. 87-62, 1987-29 I.R.B. 10
10/01/87 - 12/31/87	9%	Rev.Rul. 87-87, 1987-36 I.R.B. 8
01/01/88 - 03/31/88	10%	Rev.Rul. 87-131, 1987-50 I.R.B. 6
04/01/88 - 06/30/88	9%	Rev.Rul. 88-17, 1988-10 I.R.B. 6
07/01/88 - 09/30/88	9%	Rev.Rul. 88-50, 1988-25 I.R.B. 39
10/01/88 - 12/31/88	10%	Rev.Rul. 88-86, 1988-41 I.R.B. 1
01/01/89 - 03/31/89	10%	Rev.Rul. 88-105, 1988-51 I.R.B. 4
04/01/89 - 06/30/89	11%	Rev.Rul. 89-36, 1989-1 C.B. 309
07/01/89 - 09/30/89	11%	Rev.Rul. 89-69, 1989-1 C.B. 310
10/01/89 - 12/31/89	10%	Rev.Rul. 89-99, 1989-2 C.B. 256
01/01/90 - 03/31/90	10%	Rev.Rul. 89-125, 1989-2 C.B. 257
04/01/90 - 06/30/90	10%	Rev.Rul. 90-19, 1990-1 C.B. 186
07/01/90 - 09/30/90	10%	Rev.Rul. 90-47, 1990-1 C.B. 187
10/01/90 - 12/31/90	10%	Rev.Rul. 90-71, 1990-35 I.R.B. 4
01/01/91 - 03/31/91	10%	Rev.Rul. 90-94, 1990-46 I.R.B. 16
04/01/91 - 06/30/91	9%	Rev.Rul. 91-20, 1991-11 I.R.B. 1
07/01/91 - 09/30/91	9%	Rev.Rul. 91-33, 1991-21 I.R.B. 1
10/01/91 - 12/31/91	9%	Rev.Rul. 91-50, 1991-37 I.R.B. 1
01/01/92 - 03/31/92	8%	Rev.Rul. 91-65, 1991-51 I.R.B. 1
04/01/92 - 06/30/92	7%	Rev.Rul. 92-21, 1992-14 I.R.B. 14
07/01/92 - 09/30/92	7%	Rev.Rul. 92-44, 1992-24 I.R.B. 86
10/01/92 - 12/31/92	6%	Rev.Rul. 92-77, 1992-38 I.R.B. 12

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CCT, Inc. File No. I-T-C-93-039-TC

Application for authority pursuant to Section 214 of the Communications Act of 1934, as amended, for transfer of control of authorization to resell international switched voice services

MEMORANDUM, OPINION AND ORDER

Adopted: February 23, 1993; Released: March 4, 1993

By the Chief, International Facilities Division:

1. On November 25, 1992, CCT, Inc. (CCT) and West Coast Telecommunications, Inc. (West Coast) filed the above-captioned application pursuant to Section 214 of the Communications Act of 1934, as amended, and Section 63.01 of the Commission's Rules requesting authority to transfer control of CCT and its Section 214 authorization to West Coast. The application was put on public notice on December 2, 1992, and no comments were received.

2. CCT, Inc. is the operating name for Computer Calling Technologies, Inc., which is a privately held Delaware corporation formed in 1992 and wholly-owned by Mr. John Kane, a U.S. citizen. CCT has authority to operate as a international resale carrier of switched voice services under the regulatory requirements established for non-dominant international carriers in *International Competitive Carrier Policies*.[1] CCT also provides nationwide interstate long distance telecommunications service by reselling the domestic long distance service of other common carriers pursuant to the Commission's domestic competitive carrier policies.[2] CCT also provides intrastate service in several states either pursuant to certification, registration, or tariff requirements, or on an unregulated basis.

3. West Coast is a California corporation wholly owned by WCT Communications, Inc. (WCT), a Washington Corporation whose stock is publicly traded on the Vancouver Stock Exchange. West Coast is authorized to provide international switched voice resale service.[3] West Coast operates as a non-dominant international resale carrier subject to streamlined regulation in accordance with *International Competitive Carrier Policies*, and as a non-dominant domestic long distance resale carrier pursuant to the Commission's domestic competitive carrier policies.

4. The application states that under the proposed transaction, West Coast will acquire all of the outstanding CCT stock from Mr. Kane. Mr. Kane will receive 19,472 shares of no par value common stock of WCT. Upon completion of the stock exchange, CCT will be a wholly-owned subsidiary of West Coast. The application further maintains that international resale service will be provided to CCT's customers under CCT's existing operating name and at the same rates, terms, and conditions as set forth in CCT Tariff FCC No. 1 currently on file at the Commission. The transaction should be virtually transparent to CCT's customers. Accounting will continue to be performed in accordance with generally accepted accounting principles and any applicable FCC accounting regulations. Applicants state that the transaction will benefit the public interest because it will result in significant economic, marketing, and operational efficiencies. This should enhance CCT's ability to provide high quality, low cost telecommunications services and to compete effectively in the international switched voice service marketplace.

5. In view of the foregoing, we conclude that the transfer of control of CCT and its Section 214 authorization to West Coast will not adversely affect the public interest.

6. Accordingly, IT IS ORDERED, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, and Section 63.01 of the Commission's Rules, 47 C.F.R. § 63.01, that the application of CCT, Inc. and West Coast Telecommunications, Inc., File No. I-T-C-93-039-TC, IS GRANTED and we consent to the transfer of control of CCT and its Section 214 authorization originally granted in File No. I-T-C-92-168 (*see* n.1) to West Coast.

7. IT IS FURTHER ORDERED, pursuant to Section 203 of the Communications Act, as amended, 47 U.S.C. § 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, that CCT must continue to maintain tariffs for the services authorized in this order.

8. IT IS FURTHER ORDERED that CCT must file annual reports of overseas telecommunications traffic as required by Section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61.

9. IT IS FURTHER ORDERED that CCT is limited, under this order, to the provision of international switched voice services by the resale of the international switched voice services set forth in AT&T Tariff FCC Nos. 1 and 2, MCI Tariff FCC No. 1, US Sprint Tariff FCC Nos. 1 and 2, and ATC Tariff FCC No. 2, Cable and Wireless Tariff FCC No. 3, TRT/FTC Tariff FCC No. 15, Litel Tariff FCC No. 1, and Worldcom Tariff FCC No. 1 between the U.S. and the international points listed in those tariffs in accordance with CCT's previous authorization (*see* n.1).

10. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services the applicants seek authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

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[1] CCT, Inc., File No. I-T-C-92-168, 7 FCC Rcd 5012 (1992). *See* also, International Competitive Carrier Policies, 102 FCC 2d 812 (1985), *recon. denied*, 60 RR 2d 1435 (1986) (hereinafter *International Competitive Carrier Policies)*.

[2] Policy and Rules Concerning Rates and Facilities Authorizations for Competitive Carrier Services and Facilities Authorizations Therefor, First Report and Order, 85 FCC 2d 1 (1980); Second Report and Order, 91 FCC 2d 59 (1982); *recon.*, 93 FCC 2d 54 (1983).

[3] West Coast Communications, Inc., File No. I-T-C-91-193, 6 FCC Rcd 5759 (1991).

11. This order is issued under Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules, 47 C.F.R. §§ 1.106, 1.115, may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2), 47 C.F.R. § 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-6

In the Matter of

Amendment of Part 22 of the Commission's Rules to provide for filing and processing of applications for unserved areas in the Cellular Service and to modify other cellular rules

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: February 17, 1993; Released: February 19, 1993

By the Commission: Commissioner Quello (Chairman) not participating.

I. INTRODUCTION	1
II. DISCUSSION	2
A. Alleged Improper Procedures	2
B. Supporting Data for Maps	6
C. Matching Field Strengths along Market Boundaries	6
D. Alternative Propagation Studies	14
E. Antenna Height Minimum Limit for Formula	16
F. Standards for *De Minimis* Extensions	19
III. ORDERING CLAUSES	21

I. INTRODUCTION

1. In our *Second Report and Order* in CC Docket No. 90-6 (*Second Report*), 7 FCC Rcd 2449 (1992), we adopted rules to determine Cellular Geographic Service Areas (CGSAs) by the use of a mathematical formula. We also modified the authorizations of existing cellular systems to redefine the boundaries of their CGSAs in accordance with the new standard. In addition, the *Second Report* amended the rules to allow licensees to expand their CGSAs within their markets during the five-year fill-in period without prior authorization. Instead of filing applications for authorization of such expansions as was previously required,[1] licensees now need only to notify the Commission of the added or modified cells using FCC Form 489.[2]

2. We now have before us: (a) petitions for reconsideration of the *Second Report* filed by the Committee for Effective Cellular Rules (Committee) and JAJ Cellular (JAJ) and (b) a petition for partial reconsideration of the *Second Report* filed by McElroy Electronics Corporation (McElroy) and a "Petition for Partial Reconsideration/Clarification" filed by Comp Comm, Inc. (Comp Comm). Comments on the foregoing petitions were filed by JAJ, PN Cellular, Inc. and its affiliates (collectively, PNC Affiliates), Centel Cellular Company (Centel), McCaw Cellular Communications, Inc. (McCaw), and Quantum Communications Group, Inc. (Quantum); reply comments were filed by Committee and Quantum. For the reasons stated in this Order, the petitions for reconsideration and partial reconsideration are denied.

II. DISCUSSION

A. Alleged Improper Procedures

3. Committee claims that the Commission has exceeded its statutory authority by improperly modifying the authorizations of existing cellular systems. It alleges that the Communications Act of 1934, as amended, 47 U.S.C. Section 151 *et seq.* (the Act), prohibits modification of a cellular license unless the licensee files an application which would be subject to petitions to deny and competing applications. Committee notes that Section 308(a) of the Act states that the Commission may grant construction authority and station licenses or modifications thereof only upon written application, and Section 309(b) of the Act provides that, with certain exceptions, a modification application must be placed on public notice for at least 30 days. 47 U.S.C. Section 309(b). The public notice required by Section 309(b), the Committee observes, affords other parties the opportunity to file petitions to deny under Section 309(d)(1) of the Act or competing applications which would be considered under Section 309(e) or 309(i) of the Act, 47 U.S.C. Sections 309(e), 309 (i). Committee argues that the Commission should rescind its modification of all cellular licenses and suspend the use of the new mathematical formula as the means of determining CGSAs until the renewal of existing licenses or the issuance of new licenses.[3] Committee claims that the Commission's new rules modifying the CGSAs of existing licensees could un-

[1] Such applications for expansion have been filed using FCC Form 401.

[2] On July 10, 1992, the Commission released an Order in this docket, FCC 92-318, which postponed the dates for filing cellular system information updates and applications for authority to construct and operate new cellular systems in unserved areas, until future dates to be set by the Chief, Common Carrier Bureau. On November 13, 1992, the Common Carrier Bureau issued a Public Notice, Report No. CL-93-23, announcing that all licensees whose five-year fill-in periods will have ended on or before March 15, 1993, must submit their cellular system information updates on January 12, 1993.

[3] Committee also proposes that licensees whose five-year fill-in period has expired not be permitted to install any new cells prior to July 16, 1992, which is the effective date of the new rules adopted by the *Second Report* and the date on which the CGSAs of existing cellular systems are modified. We agree with Centel and PNC Affiliates that, under current rules, a licensee whose five-year expansion period has expired may install cells whose 39 dBu contours are entirely contained within the CGSA boundary through Form 489 filings received at the Commission prior to July 16, 1992. We also agree with PNC Affiliates that in all markets for which the five-year fill-in period has expired and for which an application requesting expansion of the CGSA has been filed before the relevant expiration date, the area(s) applied for will remain protected until the Commission has

dercut or foreclose opportunities for new parties to file applications for unserved areas, thus depriving the public of prospective service that certain applicants might offer.

4. Consistent with our powers under the Communications Act, the Commission may promulgate rules of general applicability. Additionally, the Commission may modify licenses through notice and comment rule making proceedings. *UpJohn Co. v. Food and Drug Administration*, 811 F.2d 1583 (D.C. Cir. 1987) (*UpJohn*) (citing *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956)); *American Airlines, Inc. v. Civil Aeronautics Board*, 359 F.2d 624 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 843 (1966); *Amendment of the Rules With Respect to Hours of Operation of Standard Broadcast Stations*, 8 FCC 2d 698 (1967), *affirmed*, 10 FCC 2d 283 (1967), *affirmed*, *WBEN Inc. v. United States*, 396 F.2d 601 (2d Cir. 1968), *cert. denied*, 393 U.S. 914 (1968) (*WBEN*). Licenses may be modified through rule making proceedings without affording parties an adjudicatory hearing, if the generic rules are otherwise procedurally and substantively valid. *UpJohn*, 811 F.2d at 1585. As the court in *WBEN* stated: "When, as here, a new policy is based upon the general characteristics of an industry, rational decision is not furthered by requiring an agency to lose itself in an excursion into detail that too often obscures fundamental issues rather than clarifies them." *WBEN*, 396 F.2d at 618.

5. The Commission has complied with all relevant legal requirements in conducting this notice and comment rule making proceeding which, in both form and effect, modified the authorizations of existing cellular systems by redefining the boundaries of their CGSAs in accordance with a new mathematical formula contained in new Section 22.903 of the Commission's Rules. The new formula redefines the service areas of all current cellular licensees, in order to provide a more accurate description of areas actually served. Parties were afforded ample time to comment on the proposed rule changes, including the matter of license modification. *See* the *Notice of Proposed Rulemaking* in CC Docket No. 90-6, *Amendment of Part 22 of the Commission's Rules to Provide for the Filing and Processing of Applications for Unserved Areas in the Cellular Service*, 5 FCC Rcd 1044, 1048 (1990), and the *Further Notice of Proposed Rulemaking* in this docket, 6 FCC Rcd 6158, 6159 n.7.

6. In its petition for reconsideration, JAJ requests that the Commission modify that portion of the *Second Report* which will allow the enlargement of CGSAs into areas for which applications have been submitted. JAJ had filed applications to establish cellular service in unserved areas in a number of markets following the expiration of the five-year fill-in period for those markets. The Commission's staff dismissed those applications as prematurely filed and we affirmed those dismissals in our *First Report and Order and Memorandum Opinion and Order on Reconsideration*, 6 FCC Rcd 6185 (1991) (*First Report*). JAJ has appealed our action in the *First Report*.[4] JAJ asks that, for those markets for which appeals are pending concerning the dismissal of unserved area applications, the Commission require incumbent licensees to demonstrate, at the time they file their updated system information pursuant to Section 22.925 of the Rules, that they have not claimed as CGSA any area which encroaches upon an unserved area applicant's proposal currently subject to appeal.

7. Similarly, McElroy seeks reconsideration of the *Second Report* to the extent that it does not want the new rules to be applied to limit the areas McElroy may serve in the event that its applications are reinstated. Like JAJ, McElroy had applied for unserved areas after the expiration of relevant fill-in periods, its applications had been dismissed by the Commission, the *First Report* affirmed those dismissals and McElroy has appealed the *First Report*.[5] McElroy maintains that the new method of determining CGSAs established in the *Second Report*, if applied to markets for which McElroy's applications had been dismissed, would deprive McElroy of serving areas which it was entitled to serve under the rules which existed at the time it filed its applications.

8. JAJ and McElroy seek in effect to preserve the *status quo ante* our new rules. Nevertheless, our decision to modify the service areas of cellular licensees does not involve retroactive rule making, because at the time JAJ and McElroy filed their unserved area applications, there were no procedures in place governing the filing of unserved area applications. The mere fact that JAJ and McElroy submitted applications prior to the adoption of substantive and procedural rules governing such proposals does not entitle those applications to any special treatment. While we recognize that changes in service areas may affect the areas available for unserved area applicants and thus may affect JAJ's and McElroy's business plans, the Commission may alter the eligibility criteria in rule making proceedings as long as adequateexplanation is provided. *See United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956).

9. In this rule making proceeding, we stated that we needed to determine the areas actually served by cellular systems because the previous method underestimated the service area boundaries. We further stated that the new method for determining service areas must be applied to existing systems and be in place before applications for unserved areas are accepted in order to avoid unnecessary litigation and delays. In addition, we further stated that adoption of a simple, straightforward method for determining cellular system coverage would facilitate and expedite authorization of new cellular systems in areas of the country that remain unserved and create opportunities to establish new systems. *Second Report*, 7 FCC Rcd 2449 (1992). In sum, we cannot find that the rule changes are retroactive or that they unlawfully or unreasonably affect JAJ or McElroy. *See Bowen v. Georgetown University Hospital*, 488 U.S. 204, 216 (1988) (Scalia, J. concurring).[6] In any event, any applications within the class described by JAJ and McElroy that are granted are, of course, subject to rescission if JAJ's and McElroy's applications are reinstated as a result of their pending appeals.

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acted upon the relevant application by a final order.

[4] JAJ's case is pending before the United States Court of Appeals for the District of Columbia Circuit. *JAJ Cellular v. FCC*, No. 91-1552 (D.C. Cir., filed November 18, 1991).

[5] McElroy's case is pending before the United States Court of Appeals for the District of Columbia. *McElroy Electronics Corporation v. FCC*, No. 91-1545 (D.C. Cir., filed November 18, 1991).

[6] *See also* our *First Report* in this docket, 6 FCC Rcd 6185, 6193 (1991).

B. Supporting Data for Maps

10. The *Second Report* revised Sections 22.925 and 22.926 of the Rules to simplify some of the original map requirements for system information updates. The revised rules require only that CGSA boundary and cell sites be plotted and state that service area boundaries of individual cells that do not constitute a portion of the CGSA boundary need not be plotted. Committee does not object to these simplifications, but proposes that updated system information filings include, for each of the cells which constitute a portion of the CGSA boundary for a cellular system, a date-stamped application (either Form 401 or Form 489) containing the engineering upon which the service area is calculated. Committee contends that such supporting data will assist the Commission's staff in validating a licensee's system update maps and will supply a substantial portion of the necessary Commission documents in a single filing.

11. We reject Committee's proposal because it would cause an unnecessary expenditure of Commission and licensee resources. The Commission's files already contain the information upon which the system information update maps are to be based.[7] Further, increasing the paper and microfiche filing burden on cellular licensees would be wholly inconsistent with the Commission's efforts to minimize filing requirements.

C. Matching Field Strengths along Market Boundaries

12. In its Petition for Partial Reconsideration, Comp Comm proposes that the Commission establish formal procedures under which carriers may apply for and obtain Commission authorization to operate cellular facilities designed to produce a signal level that is equal, along the market boundary, to the signal level of the facilities of other carriers on the same frequency block in the adjacent markets. According to Comp Comm, these procedures are necessary to mitigate a "significant inequity" that favors earlier licensed cellular carriers over those authorized later.[8] In essence, Comp Comm's concern is that, where a new service area boundary (SAB) extension into an adjacent market was created (or a previously authorized SAB extension into an adjacent market was increased) by our action in the *Second Report*,[9] carriers licensed to serve that adjacent market will have difficulty obtaining authorization to operate facilities that produce an equivalent or stronger signal in the extension area near the market boundary.

13. The distance from a cell site to its SAB is greater than the distance to its 39 dBuV/m contour.[10] Consequently, under the rules adopted in the *Second Report*, cell sites operating with any given antenna height and transmitting power cannot be located as close to market boundaries as they could under the previous rules, without causing an extension into the adjacent market. Carriers must apply for prior Commission authorization (on FCC Form 401) before operating any cellular facility for which the SAB would extend into the adjacent market, unless the adjacent market licensee on the same frequency block consents to the extension.[11] Comp Comm believes that such consent is difficult to obtain. Comp Comm predicts that opposition of the adjacent market carriers will prevent licensees of subsequently authorized systems from obtaining authority to operate facilities providing adequate coverage in areas of their markets near the market boundaries. Without such facilities in operation, the signal from a previously authorized adjacent market cellular system could be stronger (in these areas) than the signal from the system subsequently authorized to serve the market.[12] This signal disparity could cause the subsequently authorized systems to lose a significant portion of the subscriber calls initiated in these areas of their CGSAs to the previously authorized adjacent market systems.[13] Comp Comm believes that the best way to resolve this problem is to allow licensees to operate facilities that produce comparable extensions back into the markets of systems having extensions that were authorized by the *Secondx Report*, with the goal of equalizing the signal strengths of adjacent systems at the market boundary.

14. In its comments, Quantum supports Comp Comm's petition, stating that Rural Service Area (RSA) licensees should not be placed at a competitive disadvantage merely because they have the "historical misfortune" of being licensed by the Commission subsequent to the Metropolitan Statistical Area (MSA) licensees.[14] McCaw and Centel, however, oppose Comp Comm's request. They note that the use of the new formula-derived SAB, instead of the Carey 39 dBuV/m contour, does not change the actual coverage of cellular systems, but only the depiction of it on maps.[15] They further argue that the SAB extensions authorized by the *Second Report* are subject to the same condition as all other SAB contour extensions, that is, the licensee must "pull back" the extension in the event of

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[7] If any information appears to be missing from the Commission's files, as Committee alleges might occur in some cases, the Commission's staff, as necessary, can obtain the needed information.

[8] *See* Comments of Comp Comm at 3.

[9] *See Second Report* at footnote 35.

[10] The distance to the SAB is calculated by the formula adopted in the *Second Report*. The distance to the 39 dBuV/m contour is determined from the field strength curves in the Carey Report (FCC Report No. R-6406, "Technical Factors Affecting the Assignment of Facilities in the Domestic Public Land Mobile Radio Service", by Roger B. Carey, dated June 24, 1964).

[11] See Section 22.9(d)(7)(iii) of the Commission's rules. Comp Comm asserts that "contract approval" (*see* Section 22.903(d)(2) of the Commission's Rules) is needed for any extension into an adjacent market. This argument is not correct. Contract approval is not required for *de minimis* extensions (*see* Section 22.903(d)(1) of the rules).

[12] At any given location, the relative signal strengths of two or more cellular systems on the communications channels in the same frequency block are of no particular consequence, provided proper frequency coordination to avoid co-channel and first adjacent channel interference has been done. However, within a licensee's CGSA, the signal of that licensee's system on the control channels should usually be stronger than those of other cellular systems on the same frequency block. This is because a cellular mobile telephone designed in accordance with the cellular compatibility specification (OST Bulletin 53) seeks the strongest control channel signal in the preferred frequency block when initiating a call.

[13] Subscribers would also lose under this scenario because they would be roamers when receiving service from the adjacent market system, even when they are physically located within their home market. As roamers, subscribers are generally billed at a somewhat higher air-time rate and, depending on the destination of the call, may also incur long-distance charges that would have been avoided if service had been provided through their "home" carrier.

[14] Comments of Quantum at 3.

[15] Comments of Centel at 3; comments of McCaw at 10.

interference.[16] McCaw indicates that it would be helpful for the Commission to clarify that the interference problems to which the condition applies include more than co-channel and adjacent channel interference, and extend to the situation of subscriber traffic being captured by the adjacent market system.[17] Quantum supports this proposition and suggests that it is a reasonable alternative to Comp Comm's proposal for a formal process.[18] McCaw and Centel conclude that the formal procedures requested by Comp Comm are unnecessary and the Commission should instead continue to encourage licensees to resolve these matters on an informal basis.[19] In reply, Quantum concedes that it is immaterial whether subsequently licensed carriers are authorized to operate facilities that cause a comparable extension into adjacent markets as requested by Comp Comm or if instead, the prior licensed carriers are required to "pull back" their SAB extensions as suggested by Centel and McCaw, because the result is the same. According to Quantum, the important thing is for the Commission to "explicitly recognize that the Commission's goal with regard to carriers in adjacent markets is the achievement of equal signal strength at market boundaries."[20]

15. In fact, our goal with regard to cellular coverage is not to dictate a balancing of signal strengths along geopolitical boundaries, but rather to establish rules and policies that will lead to the efficient provision of nationwide seamless cellular service to the public.[21] Further progress toward achievement of this goal will continue to depend in large part upon the success of informal negotiations between cellular licensees in determining mutually agreeable arrangements of facilities that provide an efficient juncture between adjacent systems. Although the MSA/RSA boundaries are useful as a starting point for such negotiations, they may not represent the best locations for a balancing of the signal strengths of adjacent systems in every case. We would rather rely upon market forces and the judgment of cellular carriers to determine the natural expanse of their cellular subscriber markets. We will not require, as Comp Comm requests, that the engineering design of nearly every cellular system be altered through a formal application process simply to align predicted signal strength contours with MSA/RSA boundaries. We agree with Centel and McCaw that allowing and encouraging neighboring licensees to resolve these matters on an informal basis will achieve the most effective resolution of service boundary issues arising from the convergence of expanding systems.

16. We will, however, clarify certain matters in regard to our action in the *Second Report* authorizing the new and increased SAB extensions. We knew that adopting the formula method for determining CGSAs, while not changing the actual coverage of any systems, would create new SAB extensions and increase the size of existing SAB extensions, as depicted on maps. We saw no public benefit in requiring that the actual coverage of systems so affected be reduced merely to confine the newly depicted SAB extensions to the geographic areas that the 39 dBuV/m contour extensions circumscribe.[22] Indeed, to have done so would have, in many cases, deprived the public of service it currently receives. Nor did we wish to re-examine and re-authorize each SAB extension on a case-by-case basis through the application process. Such a procedure would have been extremely burdensome for licensees and the Mobile Services Division staff, with no public benefit and little if any benefit to RSA licensees.

17. The remaining option was to authorize all of the newly created and increased SAB extensions, and we chose this option.[23] We assumed that, by stating in footnote 35 of our *Second Report* that these extensions are considered *de minimis*, it would be clear that the condition which appears on every cellular authorization regarding "minor" extensions applies to the newly created and increased SAB extensions as well.[24] Upon reconsideration, it appears that our use of the term "*de minimis*" may have caused some confusion. We intended to refer to all SAB extensions resulting from our action in the *Second Report*.[25]

18. Centel and McCaw are correct in their assertion that the Commission may require that any particular SAB extension created or increased by the *Second Report* be "pulled back" in the event interference is caused.[26] Furthermore, since extensions are now defined in terms of the SAB rather than the 39 dBuV/m contour, the amount of reduction in transmitting power or antenna height (or both) necessary to totally eliminate an extension (*e.g.*, in a

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[16] *Id.* The phrase "pull back the ... contour" used in the condition appearing on all cellular licenses means that the licensee must reduce the transmitting power or antenna height (or both) used at the pertinent cell sites. Such reductions move the calculated service area boundary or predicted contour closer to the cell site, reducing or eliminating the extension.

[17] Comments of McCaw at footnote 21.

[18] Reply Comments of Quantum at 4.

[19] Comments of Centel at 4; Comments of McCaw at 10-11.

[20] Reply Comments of Quantum at 5.

[21] *See, e.g., Public Cellular Radio Communications Service*, 49 RR 2d 809 (1981).

[22] The Commission could have done this by ordering an across-the-board 7 dB reduction in power for the affected cell sites.

[23] *See Second Report* at footnote 35.

[24] This condition reads as follows:

> "This authorization does not include the right to any interference protection in any areas outside the MSA/RSA and is also conditioned upon coordinating with the current or future co-channel licensee(s) in the areas outside the MSA/RSA. The licensee herein is put on notice that in the event the current or future MSA/RSA licensee encounters interference from the extension(s), the licensee herein will have to change frequencies in those cell(s) or pull back their 39 dBu contour to eliminate the interference due to the extension."

[25] Existing 39 dBuV/m contour extensions that were authorized in consideration of agreements between licensees did not become *de minimis* SAB extensions as a result of the *Second Report*. Except for their depiction on maps, such extensions are not affected by the *Second Report* because it is presumed that the licensees involved had previously agreed to the antenna height and transmitting power utilized at the pertinent cell site(s), and these technical operating parameters did not change as a result of the *Second Report*.

[26] Note, however, that an SAB extension must be into a licensee's CGSA in order for that licensee to demonstrate that interference is being caused. The Commission will not consider claims of interference to unserved areas. As a general practice, the Mobile Services Division staff will first try to facilitate an agreement between the two licensees, and only require SAB extensions to be "pulled back" as a last resort if no agreement can be reached.

worst case scenario) is greater. Licensees of later authorized systems can thus compel the licensees of earlier authorized systems to "pull back" extensions to a greater degree under the rules adopted in the *Second Report* than they could under the previous rules. If anything, this fact enhances the negotiating position of the later authorized systems. Rather than the total elimination of SAB extensions, we believe a better result, in most cases, is some degree of SAB overlap between systems, with the location of balanced signal strengths negotiated informally between the adjacent licensees on the same frequency block.

19. In view of the rapid growth of cellular coverage and the resulting convergence of CGSAs, we believe that overlapping of the SABs of adjacent systems is inevitable.[27] Consequently, we find merit in the suggestion of McCaw and Quantum that we recognize subscriber traffic capture as a form of interference for the purpose of the aforementioned standard authorization condition.[28] In the *Second Report*, we revised Section 22.903 to restate our long standing definition for the CGSA of a cellular system in the introductory paragraph:

> "The Cellular Geographic Service Area (CGSA) of a cellular system is the geographic area considered by the Commission to be served by the cellular system. The CGSA is the area within which cellular systems are entitled to protection and within which adverse effects for the purpose of determining whether a petitioner has standing are recognized."[29] Clearly, the capture of subscriber traffic within a licensee's CGSA by an adjacent system can have an adverse effect upon the licensee. The service of a cellular system is entitled to protection within its CGSA. Accordingly, we find that cellular licensees are entitled under Section 22.903 to protection from capture of subscriber traffic within their CGSA by adjacent systems on the same frequency block. This protection will be applied and limited using the following principles:
>
> (a) that a licensee may not begin to operate a facility producing a SAB extension into the CGSA of an adjacent system without the consent of the licensee of that adjacent system, nor continue to operate a previously authorized facility producing a SAB extension into the subsequently authorized CGSA of an adjacent system over the objection of the licensee of that adjacent system; and
>
> (b) that the licensee of a cellular system is at most entitled to have a CGSA free of SAB extensions from other systems on the same frequency block.

20. We believe that this interpretation, which we are codifying in new paragraph (f) of Section 22.903, ensures a "level playing field" for all cellular licensees in negotiating the arrangements of facilities at the boundaries of adjoining systems. We do not find that the rules adopted in the *Second Report*, as clarified herein, afford an unfair advantage to MSA licensees over RSA licensees, nor to earlier authorized systems over subsequently authorized systems. We believe that boundary issues are best resolved by informal agreements between the licensees, and that our rules and policies should encourage such agreements. For the foregoing reasons, we deny Comp Comm's request that we establish formal application procedures under which equal predicted field strengths at market boundaries would be mandated. Nevertheless, the foregoing clarification and the rule amendments we adopt herein should alleviate Comp Comm's concern about signal strength parity between adjacent carriers. In addition, we grant Comp Comm's request for a minor clarification of our contract extension rule.[30]

21. Contract extensions of service area boundaries are defined in Section 22.903 of the rules.[31] Licensees may notify the Commission about certain contract extensions on FCC Form 489. *See* Sections 22.9(d)(7)(iii), 22.913(d) and 22.923(c). Unserved area applicants may propose contract extensions in Phase I modification applications and in Phase II, in accordance with the provisions of Sections 22.902(b)(4) and 22.903(d)(3). It appears that some of our statements in this docket about contract extensions have raised the question of whether applicants and licensees must furnish evidence to the Commission that such contracts exist or whether the Commission will rely on written representations in relevant Forms 401 and 489 that such contracts exist. We have determined that we should be able to rely on representations of our licensees in this regard. If an applicant or licensee misrepresents the existence of a contract allowing an extension of a service area boundary, this misrepresentation will be viewed as a serious violation of our Rules and, we will take appropriate enforcement action against it. *See, e.g.*, Section 1.17 of our Rules concerning the obligation of our licensees and applicants to be completely truthful in any representations made to the Commission. Accordingly, licensees may be ordered to cease and desist from operating in a particular extension area in addition to any other enforcement action.

D. Alternative Propagation Studies

22. CECR requests that the Commission reconsider its decision in the *Second Report* to allow a carrier to submit for the Commission's consideration an alternative CGSA determination based upon propagation studies or field measurements.[32] In support of this request, CECR states that allowing such submissions is inconsistent with our goal of expeditious application processing, that the circumstances under which such submissions will be considered were not completely defined in the *Second Report*, and that we did not specify which propagation study or measurement methodologies would be acceptable.[33] CECR further argues that a public comment period with respect to each submission

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[27] The overlapping of SABs is in fact desirable in that it promotes the Commission's goal of nationwide seamless cellular service and facilitates the development of inter-system handoff.

[28] Note 25, *supra*.

[29] *See* Section 22.903 of the Commission's Rules.

[30] Comp Comm requests that Section 22.903(d)(2), concerning contract service area boundary extensions, be amended to explicitly state that contract extensions which do not involve unserved area are allowed even after the expiration of the five year fill-in period. Comments of Comp Comm at 6. We agree and are amending that paragraph accordingly.

[31] Contract extensions are distinguishable from contracts to allow Cellular Geographic Service Areas inside RSAs as provided in Section 22.31(f).

[32] *See Second Report* at 7; *see also* Section 22.903(b) of the Commission's Rules.

[33] CECR Petition at 14.

would be necessary,[34] and that due process requires that interested parties should have the right to propose alternative CGSA boundaries for cellular systems.[35] Centel and McCaw oppose CECR's request, stating that CECR's arguments were before the Commission when it adopted the *Second Report*,[36] that the flexibility to employ alternative CGSA determinations in certain situations is needed,[37] and that there is no legal, due process, or public interest justification for allowing interested parties other than the licensee to submit showings to redefine a CGSA.[38] In reply, CECR alleges that the objections of McCaw and Centel are in their self interest, that they are concerned with maximizing their service areas but not with accuracy, and that the Commission must determine CGSAs based on licensee and opposition filings.[39]

23. Our rules governing propagation showings in the cellular service have always allowed applicants to submit alternative propagation studies.[40] As we stated in the *Second Report*, the majority of commenters in this proceeding pointed out the continued need for an option to use alternative coverage showings in lieu of the formula in the relatively few places where unusual terrain or other circumstances affect propagation.[41] Accordingly, we retained a provision in the rules we adopted allowing such submissions.[42] We believe that this provision should be retained. We have received few such studies to date, and there has been no effect on our processing of cellular applications and notifications.[43] Although we did not attempt to list every conceivable circumstance under which we might consider an alternative CGSA determination, we did limit them to situations where the CGSA would be substantially larger or smaller (*i.e.*, 20 percent) and in which the formula might be expected to give misleading results (*i.e.*, microcells, terrain obstructions or features, unusually flat or rough terrain).[44] Furthermore, we did not and will not specify which methodologies would be acceptable. There are many methodologies in existence now, and more may be developed. A particular method may be more appropriate in one case, and a different method more appropriate in another. We will consider any methodology that has a sound technical foundation and is applicable to the situation under consideration.

24. We note that each alternative CGSA determination submission is evaluated in connection with a major application (FCC Form 401), for which there is a statutory 30 day public notice period during which parties having standing may file a petition to deny. We reject CECR's contention that any interested party should be able to submit a CGSA determination for a cellular system. Although CGSAs are determined by the Commission through application of the rules, such determinations are based only upon showings made by the applicant and oppositions to those showings made by parties with standing to file a petition to deny the application.

E. Antenna Height Minimum Limit for Formula

25. In its petition, CECR requests that the Commission reconsider its decision in the *Second Report* to set a minimum height above average terrain (HAAT) value of 100 feet for use in the adopted mathematical formula. CECR asks that this value be changed to 1 foot.[45] In support of this request, CECR argues that the 100 foot minimum is an "anachronism carried over from the Carey Report" and is not supported by the record in this proceeding. CECR notes that a minimum value of 1 foot would serve as well as 100 feet to prevent the formula from producing undefined results. Also, CECR claims that the use of actual HAAT values less than 100 feet would improve the accuracy of service area boundary computations.[46] Centel opposes CECR's request, stating that the Carey Report curves, from which the formula was derived, are invalid for antenna heights below 100 feet HAAT.[47] In reply, CECR notes that the Mobile Services Division has accepted applications in the Public Land Mobile Service (paging) using HAAT values as low as 1 foot to perform interference studies.[48]

26. We adopted the 100 foot minimum HAAT value because its use in Carey Report methodology has been a standard engineering practice for many years. At lower antenna HAATs, extrapolated values of the Carey field strength curves may not be valid.[49] The Mobile Services Division has allowed, in certain cases, the use of lower HAAT values for interference studies in the Public Land Mobile Service (PLMS); however, this does not justify requiring the use of such values in the cellular service.[50] In the PLMS, our concern is that each individual assignment not cause interference between co-channel stations. In the cellular service, the contour distances calculated using the formula (and previously derived from the field strength curves in the Carey Report) are not used for making

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[34] *Id.* at 16.
[35] *Id.* at 17.
[36] Comments of McCaw at 12; Comments of Centel at 5.
[37] Comments of Centel at 5.
[38] Comments of McCaw at 5; Comments of Centel at 13.
[39] Reply Comments of CECR at 4-5.
[40] A provision for alternative propagation studies was first incorporated into the cellular rules in 1982. *See Memorandum Opinion and Order on Reconsideration* in CC Docket No. 79-318, FCC 82-99, *An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems*, 89 FCC 2d 58, 101.
[41] *Second Report* at 6, paragraph 10.
[42] *See* Section 22.903(b).
[43] In the *Second Report*, we stated that we did not envision routinely determining CGSAs on the basis of alternative coverage showings. *Second Report* at 7, paragraph 12.
[44] *Id.*
[45] CECR Petition at 10.
[46] *Id.* at 11-12.
[47] Comments of Centel at 7.
[48] Reply Comments of CECR at 3.
[49] *Second Report* at 6, paragraph 11 and footnote 26.
[50] The Mobile Services Division staff uses an internally developed Fortran computer program to perform Carey Report interference analysis in the Public Land Mobile Service. This program was modified to accept HAAT values as low as 1 foot, but does not always extrapolate Carey curve data. If a low ERP is also used, the program uses a special sub-table of extrapolated Carey data merged into calculated free space values. This practice is a reasonable application of propagation theory, but has not been verified by measurements. The Mobile Services Division ruled that it is acceptable for Public Land Mobile Service applicants to submit interference studies that rely on this computer program, including the low HAATs, because the Division staff uses it. *See Fred W. Daniel*, 6 FCC Rcd 1840 (Mobile Ser. Div. 1991).

assignments based on co-channel interference studies, but only for determining service area. A major concern in the cellular service is that the service area so determined not be understated. Indeed, the principal reason we adopted a formula approximating the Carey 32 dBuV/m contour, rather than the Carey 39 dBuV/m contour as we originally proposed, is to avoid significantly underestimating actual coverage.[51] If we were to require the use of HAAT values below 100 feet as CECR suggests, we would risk doing just that. Furthermore, we will not consider reducing a CGSA that has been determined in accordance with our rules, including the 100 foot HAAT minimum rule, at the request of a third party.

27. There may be a few instances where application of the 100 foot minimum in place of a lower antenna HAAT might cause the calculated SAB of a cell to extend into an adjacent market. Such an extension could properly be the subject of an agreement between adjacent market licensees, or alternatively, evaluation as *de minimis*. If these measures fail, the licensee could request a waiver of the 100 foot minimum HAAT, but would have to justify the waiver on technical grounds.[52] We would grant such a waiver only in unusual cases.[53]

28. There is one situation in which the 100 foot minimum may work an unnecessary hardship. We have previously established the minimum size for a stand-alone cellular system in an unserved area as 50 square miles. This standard implies a one-cell system where the distance to the SAB is 4 miles. Under the formula, to arrive at a distance of 4 miles with a 100 foot antenna HAAT, the effective radiated power cannot exceed 0.26 Watt. We realize that this limited power range (0.10 to 0.26 Watt) may excessively restrict small cell design options.

29. To propose a higher power, unserved area applicants proposing a single cell with a radius under 5 miles could submit an alternative CGSA determination under Section 22.903(b), because5our guidelines consider such a cell to be a microcell.[54] However, there may be many such applications, and leaving these applicants no choice but to have an alternative CGSA determination prepared, solely to avoid the 100 foot minimum HAAT requirement, does not seem justified. Furthermore, evaluating a substantial number of alternative CGSA determinations during the Phase I unserved area processing would place a heavy burden on the Mobile Services Division staff. Accordingly, we will amend Section 22.903 to allow unserved area applicants proposing a cell with a maximum ERP of 10 Watts or less the option to use the formula with an antenna HAAT less than 100 feet, but not less than 10 feet.[55] This rule amendment will allow a reasonable range of ERP for small cell design. However, even under this exception to the general rule, the minimum calculated distance to the SAB will remain 3.4 miles.[56] At closer distances, other technical factors[57] affect radio wave propagation, thus a more complex analysis or a measurement procedure, such as the alternative CGSA determination exhibit entails, is appropriate.

F. Standards for *De Minimis Extensions*

30. Finally, CECR requests that the Commission issue a Further Notice of Proposed Rule Making proposing to adopt standards for *de minimis* extensions. CECR asserts that the *Second Report* attempted to address this matter but implies that it left several areas that need clarification. For example, CECR asks if 31 percent larger *de minimis* extensions will be permitted using the SAB as opposed to the 39 dBuV/m contour, and whether the percentage area within a *de minimis* extension remains the same.[58] Centel believes that there is no need to pursue CECR's request to initiate a further rule making, and that the Commission should continue to authorize new extensions on a case-by-case basis.[59]

31. Occasionally, issues concerning individual SAB extensions (including *de minimis* and contract extensions) arise and are resolved in application cases. We do not believe that a further rule making proceeding is necessary to address the general questions CECR raises.

32. It was our intention, in the *Second Report*, to leave undisturbed the continuity of evaluation of *de minimis* SAB extensions on a case-by-case basis. We emphasize here that the principal defining characteristic of a *de minimis* SAB extension is that it is demonstrably unavoidable for technical reasons stemming from good cellular engineering design practices, in order to satisfactorily serve an area near the market boundary but within the licensee's market. A *de minimis* extension is not authorized for the purpose of allowing a licensee to provide service in the adjacent market.[60] The size of the extension, either absolutely or as a percentage of the total cell, is a secondary criterion. We will continue to authorize facilities that produce *de minimis* extensions under existing case law,[61] but we are cognizant of the fact that the extension areas will be larger, both absolutely and as a percentage, as a result of depicting them with the SAB rather than the Carey 39 dBuV/m contour.

33. We respond to CECR's specific questions about these adjustments as follows. When we say that the distance from a cell site to its SAB is 31 percent greater than the distance to its 39 dBuV/m contour, we mean that if the distance to the Carey 39 dBuV/m contour of a cell is, for example, 10 miles, then the distance to the SAB is 13.1 miles. From

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[51] *Second Report* at 4, paragraph 7.

[52] The justification would consider the actual terrain profile between the cell site and the SAB.

[53] See Section 22.19 of the Commission's rules for the general requirements for waiver requests.

[54] *Second Report* at footnote 32.

[55] Under this exception to the general rule, for example, these ERP/HAAT combinations yielding a 4 mile distance to the SAB would be acceptable: 10 Watts at 16 feet, 4 Watts at 25 feet, 1 Watt at 51 feet.

[56] The minimum calculated distance to the SAB, 3.4 miles, was established by the Commission's adoption of the 0.1 Watt ERP and 100 foot HAAT minimum limits. *Second Report* at 6, paragraph 11. Under the new rule provision, 10 Watts ERP and 10 feet HAAT, which also calculate to 3.4 miles, would be acceptable. The 3.4 mile minimum calculated distance is being codified herein. See new paragraph (a)(5) to Section 22.903 in the appendix.

[57] For example, the vertical antenna pattern, reflection coefficient of the ground, and presence of intervening structures may affect radio wave propagation to locations near the cell site.

[58] CECR Petition at 19.

[59] Comments of Centel at 4; Comments of McCaw at 14.

[60] A *de minimis* extension can later become part of a CGSA, however, pursuant to Section 22.903(c).

[61] *See e.g., Portland Cellular Partnership*, 6 FCC Rcd 2283, 2284 (1991).

this it follows that, for a cell with a circular service area, the total area within the SAB is 71.6 percent greater than that within the 39 dBuV/m contour.[62] Generally, the *Second Report* increased the area within *de minimis* extensions (being bounded by the SAB, rather than the Carey 39 dBuV/m contour) expressed as a percentage of the total cell area by about 8 percent. For example, if the area within a 39 dBuV/m contour extension comprises 10 percent of the area within the circular 39 dBuV/m contour of the cell, the area within the SAB extension comprises about 18 percent of the area within the circular SAB of the cell.[63] Rather than focusing on the area, however, applicants should concentrate on demonstrating that any *de minimis* extensions are unavoidable consequences of good cellular design.

III. ORDERING CLAUSES

34. Accordingly, IT IS ORDERED that the petition for reconsideration filed by JAJ Cellular and the petition for partial reconsideration filed by McElroy Electronics Corporation ARE DENIED.

35. IT IS FURTHER ORDERED that the petition for reconsideration filed by the Committee for Effective Cellular Rules and the "Petition for Partial Reconsideration/Clarification" filed by Comp Comm, Inc. ARE GRANTED to the extent indicated herein and ARE DENIED in all other respects.

36. IT IS FURTHER ORDERED that the rule changes made herein WILL BECOME EFFECTIVE thirty (30) days after publication in the Federal Register, except for the revision of paragraph (a)(3) and the addition of paragraph (a) (5) in Section 22.903 of the Rules, which shall become effective immediately upon publication in the Federal Register.[64]

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 22 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 22 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1083, as amended; 47 U.S.C. 154, 303.

2. Section 22.903 is amended by revising paragraphs (a)(3), (d)(2) and (e) and adding new paragraphs (a)(5) and (f) as follows:

§ 22.903 Cellular Geographic Service Area.

(a) * * *

(3) The value used for h in the formula in paragraph (a)(2) of this section must not be less than 25 feet HASL (or HAMSL, as appropriate for the support structure). The value used for h in the formula in paragraph (a)(1) of this section must not be less than 100 feet HAAT, except that for unserved area applications proposing a cell with an ERP not exceeding 10 Watts, the value for h used in the formula to determine the service area boundary for that cell may be less than 100 feet HAAT, but not less than 10 feet HAAT.

* * * * *

(5) Whenever use of the formula in paragraph (a)(1) of this section pursuant to the exception contained in paragraph (a)(3) of this section results in a calculated distance that is less than 3.4 miles, the radial distance to the service area boundary is deemed to be 3.4 miles.

* * * * *

(d) * * *

(2) *Contract extensions.* Licensees of the first authorized cellular systems on the same frequency block in adjacent MSAs or RSAs may enter into contracts to allow service area boundary extensions into their CGSA and/or unserved area in their MSA or RSA during the five year fill-in period of the MSA or RSA into which the service area is to extend. Licensees of cellular systems on the same frequency block in adjacent MSAs or RSAs may enter into contracts to allow service area boundary extensions into their CGSA only (not into unserved area) in their MSA or RSA at any time.

(e) *Multiple-licensed cells.* A single cell may be used to serve multiple markets. Nevertheless, a cell located in one market may not be used in determining the CGSA for a different MSA, RSA, or unserved area market unless the cell is licensed for both markets.

(f) *Protection afforded.* Within the CGSA determined in accordance with this section, cellular systems are entitled to protection from co-channel and first-adjacent channel interference and from capture of subscriber traffic by adjacent systems on the same frequency block.

(1) Licensees must cooperate in resolving co-channel and first-adjacent channel interference by changing frequencies used at specific cells or by other technical means.

(2) Protection from capture of subscriber traffic is applied and limited in accordance with the following:

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[62] For a cell with a radial distance to its 39 dBuV/m contour of 10 miles in all directions, the area within the 39 dBuV/m contour is 314 square miles, and the area within the SAB is 539 square miles, an increase of 225 square miles, or 71.6 per cent.

[63] A rule of thumb for circular SABs and straight market boundaries is that a SAB extension comprises about 20 percent of the total cell SAB when the largest incursion into the market is about half of the radial distance from the cell site to the SAB.

[64] 5 U.S.C. Section 553 (d)(1) allows these rule sections to become effectively in less than thirty days after being published in the Federal Register because the rule sections grant exemptions to prior governing rules.

(i) It is presumed that subscriber traffic is captured if a service area boundary of one cellular system extends into the CGSA of another operating cellular system. Therefore, cellular licensees must not begin to operate any facility that would produce a service area boundary extension into the existing CGSA of another operating cellular system on the same frequency block without first obtaining the written consent of the licensee of that system. However, cellular licensees may continue to operate existing facilities that produce a service area boundary extension into a subsequently-authorized portion of the CGSA of another cellular system on the same frequency block until the licensee of that system requests that the service area boundary extension be removed from its CGSA. Such request may be made directly to the licensee of the extending system or to the Commission. In the event such request is made, the licensee of the extending system must reduce the transmitting power or antenna height (or both) at the pertinent cell site as necessary to remove the service area boundary extension from the CGSA of the other system, unless a written consent from the licensee of the other system allowing the service area boundary extension is obtained.

(ii) Cellular licensees are at most entitled to have a CGSA free of service area boundary extensions from other cellular systems on the same frequency block.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-27

In the Matter of

Amendment of Section 73.202(b), RM-8178
Table of Allotments,
FM Broadcast Stations.
(Bentonville, Arkansas)

NOTICE OF PROPOSED RULE MAKING

Adopted: February 10, 1993; Released: March 5, 1993

Comment Date: April 26, 1993
Reply Comment Date: May 11, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the petition for rule making filed by JEM Broadcasting Company, Incorporated ("petitioner") requesting the allotment of Channel 239A to Bentonville, Arkansas, as that community's second local FM service. Petitioner stated its intention to apply for the channel, if allotted.[1]

2. We believe the public interest would be served by proposing the allotment of Channel 239A to Bentonville since it could provide a second local FM service to the community. Channel 239A can be allotted to Bentonville in conformity with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules, provided the transmitter is located at least 4 kilometers (2.5 miles) southwest of the community[2] to avoid a short-spacing to Station KKBL(FM), Channel 240A, Monett, Missouri.[3]

3. In view of the above, we believe it is appropriate to seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the community listed below, as follows:

	Channel No.	
City	Present	Proposed
Bentonville, Arkansas	252C3	239A, 252C2[4]

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **April 26, 1993,** and reply comments on or before **May 11, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, as follows:

JEM Broadcasting Company, Inc.
Attn: Elvis Moody, President
216 North Main Street
Bentonville, AR 72712

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] As the licensee of daytime only Station KJEM(AM), Bentonville-Bella Vista, Arkansas, JEM states that if its proposal is adopted, it intends to exercise its enhancement credit for Channel 239A, or an alternative equivalent allotment at Bentonville, at the application level.

[2] Coordinates for Channel 239A at Bentonville are 36-20-09 and 94-13-36.

[3] Coordinates at the licensed site of Station KKBL(FM) are 36-56-15 and 93-55-30.

[4] The Commission is currently considering a proposal to substitute Channel 252C2 for Channel 252C3 at Bentonville. *See Notice of Proposed Rule Making*, 7 FCC Rcd 5443 (1992), in MM Docket No. 92-176.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-279

In the Matter of

Amendment of Section 73.202(b), RM-8111
Table of Allotments,
FM Broadcast Stations.
(Hempstead, Texas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 10, 1993; Released: March 5, 1993

By the Chief, Allocations Branch:

1. At the request of Farmers Communications ("petitioner"), permittee of Station KEZB-FM, Channel 287A, Hempstead, Texas, the Commission has before it the *Notice of Proposed Rule Making*, 7 FCC Rcd 7841 (1992), proposing the substitution of Channel 287C3 for Channel 287A at Hempstead and modification of Station KEZB-FM's construction permit to specify operation on the higher powered channel. Petitioner filed comments reiterating its intention to apply for Channel 287C3 if allotted to Hempstead. No other comments were received.

2. We believe the public interest would be served by substituting Channel 287C3 for Channel 287A at Hempstead, since it could provide the community with a wide coverage area FM service. Channel 287C3 can be allotted to Hempstead in compliance with the Commission's minimum distance separation requirements with a site restriction of 18.3 kilometers (11.3 miles) north to accommodate petitioner's desired site.[1] As proposed, we will also modify petitioner's authorization for Station KEZB-FM to specify operation on Channel 287C3 in accordance with the provisions of Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 19, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Hempstead, Texas	287C3

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of Farmers Communications for Station KEZB-FM, Hempstead, Texas, IS MODIFIED to specify operation on Channel 287C3, in lieu of Channel 287A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Farmers Communications, permittee of Station KEZB-FM, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 287C3 at Hempstead are North Latitude 30-15-39 and West Longitude 96-05-29.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-193

In the Matter of

Amendment of Section 73.202(b),	RM-7717
Table of Allotments,	RM-7822
FM Broadcast Stations.	
(Corpus Christi and Three Rivers, Texas)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 10, 1993; Released: March 5, 1993

By the Chief, Allocations Branch:

1. At the request of Reina Broadcasting, Inc. ("petitioner"), permittee of Station KBSO(FM), Corpus Christi, Texas, the Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 4274 (1991), proposing the substitution of Channel 234C2 for Channel 234A at Corpus Christi and the modification of Station KBSO(FM)'s construction permit accordingly (RM-7717). Three Rivers Communications ("TRC") filed a counterproposal proposing the allotment of Channel 233C2 at Three Rivers, Texas, as the community's first local aural transmission service (RM-7822).[2] Petitioner filed comments in support of the proposal reaffirming its intention to apply for Channel 234C2, if allotted. Petitioner and TRC filed reply comments.[3] After the pleading cycle ended, petitioner and TRC filed joint further reply comments.[4]

2. In its counterproposal, TRC states that Three Rivers is a community with a population of 1,889.[5] TRC states it "desires to provide a wide coverage area service to Three Rivers and has no interest in a lesser power channel for the community." In contrast, TRC argues Corpus Christi (population 257,453) is a community with five FM and seven AM stations. TRC contends that its mutually exclusive proposal for a first local aural transmission service at Three Rivers should be, according to Commission criteria, preferred over petitioner's proposed upgrade at Corpus Christi, citing *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982). TRC concludes that under priority 3, the allotment of Channel 233C2 to Three Rivers as a first local service would best serve the public interest, citing *Savannah, Missouri*, 4 FCC Rcd 7842 (1989); *Cookville, Tennessee*, 66 RR 2d 257, 260 (1986). TRC states it will apply for Channel 233C2 if allotted to Three Rivers.

3. In its reply comments, petitioner states that it has no objection to the allotment of an alternate channel at Three Rivers that would accommodate both proposals. Petitioner proposes the allotment of Channel 228C2 to Three Rivers, which requires the deletion of vacant Channel 228A at Carrizo Springs, Texas.[6] In the alternative, petitioner proposes that Channel 264A could be substituted at Carrizo Springs. Petitioner concludes that its alternative proposal represents a "far more efficient use of the spectrum" that would clearly further the public interest, citing *Endicott, New York*, 51 FCC 2d 50, 51 (1975).[7]

4. In its reply comments, TRC argues that petitioner's assertion that TRC's "counterproposal is not sufficient for consideration and should not be viewed as technically mutually-exclusive with [petitioner's] upgrade request because an alternative channel can be substituted at Three Rivers" is "both legally invalid and factually incorrect." TRC submits that the alternative channel proposed by petitioner does not comply with the Commission's technical requirements since it is in conflict with a proposed rule making at George West, Texas. *See* MM Docket No. 91-283, 6 FCC Rcd 5627 (1991). Thus, TRC claims there is no nonconflicting channel which can be allotted to Three Rivers. TRC reaffirms its intention to apply for Channel 233C2 if allotted to Three Rivers, Texas.

5. We have reviewed the comments in this proceeding. Petitioner proposed a resolution of the conflict between the Corpus Christi and Three Rivers proposals by allotting Channel 228C2 at Three Rivers and either substituting Channel 264A for Channel 228A at Carrizo Springs, or deleting the channel. Because the petitioner introduced a new community into this proceeding, its suggested settlement proposal constitutes a new counterproposal filed beyond the time during which such proposals are accepted. As such, it is unacceptable for consideration. *See Memorandum Opinion and Order*, 5 FCC Rcd 931 (1990), n.4-5. Petitioner's reliance on *Pinewood, South Carolina*, 5 FCC Rcd 7609 (1990), to advance, after the comment period, its

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[1] The community of Three Rivers has been added to the caption.

[2] Public Notice of TRC's counterproposal was given on October 7, 1991, Report No. 1863.

[3] TRC also filed a supplement submitting the original copies of its consultant's Technical Statement and the Declaration of TRC's vice president.

[4] Although the joint further reply comments were untimely filed, they were accompanied by a request for their acceptance. While the Commission's Rules do not contemplate the filing of pleadings beyond the comment and reply comment periods unless specifically requested, in this instance acceptance is in the public interest.

Petitioner and TRC request a slight modification of the reference coordinates for TRC's proposed Channel 233C2 allotment at Three Rivers, Texas, to specify North Latitude 28-24-30 and West Longitude 98-23-49. This change will enable the Commission to grant petitioner's application for modification of its construction permit for Station KBSO(FM). We have modified the reference coordinates as requested, and petitioner's application for modification of its transmitter site was granted on February 4, 1992 (File No. BMPH-910821IC).

[5] Population figures taken from the *Rand McNally 1992 Commercial Atlas and Marketing Guide*.

[6] The construction permit for the Carrizo Springs channel expired and was subsequently cancelled by the Commission.

[7] Petitioner also objected to TRC's counterproposal on the grounds that the reference coordinates were short-spaced to its modification application for Station KBSO(FM). We need not address this issue, as the reference coordinates have been modified to permit grant of petitioner's application.

alternative proposal proposing the Three Rivers and Carrizo Springs allotments is misplaced. This situation is distinguishable from *Pinewood*. In that case, the Commission held that it was proper to accept a suggestion, filed after the close of the comment period, to substitute an alternate channel to resolve a conflict between two mutually exclusive proposals. The *Pinewood* proposal did not introduce a new community into the proceeding. In the instant case, however, petitioner's proposal does not merely introduce an alternate channel, but a new community as well. Moreover, even if petitioner's proposal was timely filed as a counterproposal, it would not be acceptable because it does not meet the Commission's technical requirements. In addition to being mutually exclusive to the previously proposed allotment of Channel 228C3 at George West, Texas, it is also short-spaced to Station KSRR-FM, Channel 225C, San Antonio, Texas, and Station KPLV, Channel 227C1, Port Lava, Texas.

6. In an attempt to resolve the technical conflicts between TRC's proposal for a new allotment at Three Rivers and petitioner's proposal to upgrade service at Corpus Christi, the staff performed an engineering analysis to determine if alternate Class C2 channels were available. Our study shows that there is no alternate Class C2 channel available for an upgrade at Corpus Christi or for a new allotment at Three Rivers. Therefore, we must comparatively consider these proposals under the allotment priorities set forth in *Revision of FM Assignment Policies and Procedures, supra,* which are:

(1) First full-time aural service;

(2) Second full-time aural service;

(3) First local service;

(4) Other public interest matters.

[Co-equal weight given on priorities (2) and (3)]

Under priority 3, a first local aural service is generally preferred over a proposal to upgrade an existing facility. *See Benton, Arkansas,* 2 FCC Rcd 1963, 1965 (1987); *LaFayette, Tennessee,* 6 FCC Rcd 3289 (1991). We find that the provision of a new first local aural transmission service at Three Rivers must be preferred over the proposal to upgrade an existing service in Corpus Christi.

7. We believe the public interest would be served by allotting Channel 233C2 to Three Rivers, Texas, as the community's first local aural transmission service. Channel 233C2 can be allotted to Three Rivers in compliance with the Commission's minimum distance separation requirements with a site restriction of 22.0 kilometers (13.7 miles) southwest to avoid short-spacings to Station KFGI, Channel 234C, Luling, Texas, and the construction permit for Station KBSO(FM), Channel 234A, Corpus Christi, Texas.[8] Since Three Rivers is located within 320 kilometers (199 miles) of the U.S.-Mexican border, concurrence by the Mexican government has been obtained.

8. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as Amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 19, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Three Rivers, Texas	233C2

9. The window period for filing applications will open on **April 20, 1993**, and close on **May 20, 1993.**

10. IT IS FURTHER ORDERED, That the request of Reina Broadcasting, Inc., seeking the substitution of Channel 234C2 for Channel 234A at Corpus Christi, Texas (RM-7822), IS DENIED.

11. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

12. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[8] The coordinates for Channel 233C2 at Three Rivers are North Latitude 28-24-30 and West Longitude 98-23-49.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-29

In the Matter of

Amendment of Section 73.202(b), RM-8157
Table of Allotments,
FM Broadcast Stations.
(Temple, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: February 9, 1993; Released: March 5, 1993

Comment Date: April 26, 1993
Reply Comment Date: May 11, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Progressive Communications, Inc. ("petitioner"), permittee of Channel 269A, Temple, Texas, requesting the substitution of Channel 269C3 for Channel 269A and modification of petitioner's authorization to specify operation on the higher powered channel. Petitioner states that it will apply for Channel 269C3, if allotted.

2. We believe the public interest would be served by proposing the substitution of Channel 269C3 for Channel 269A at Temple, since it could provide the community with an additional wide coverage area FM service. Channel 269C3 can be allotted to Temple in compliance with the Commission's minimum distance separation requirements with a site restriction of 20.1 kilometers (12.5 miles) northwest to avoid a short-spacing to vacant but applied for Channel 270A, Lometa, Texas. [1] We also note that Channel 269C3 is short-spaced to Station KOKE-FM, Channel 269A, Giddings, Texas. However, Station KOKE-FM was ordered to Channel 268C2 in MM Docket No. 86-328. *See* 2 FCC Rcd 1940 (1987). Therefore, final licensing for Channel 269C3 at Temple may be delayed until Station KOKE-FM is licensed on Channel 268C2 at the site specified in its construction permit. As requested, we also propose to modify petitioner's authorization for Channel 269A at Temple to specify operation on Channel 269C3. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of the channel at Temple or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Temple, Texas	269A, 282C2	269C3, 282C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. IT IS ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Notice* by Certified Mail, Receipt Requested, to Radio Lee County, P.O. Box 387, Giddings, Texas 78942 (licensee of Station KOKE-FM).

6. Interested parties may file comments on or before **April 26, 1993,** and reply comments on or before **May 11, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

M. Anne Swanson, Esq.
Koteen & Naftalin
1150 Connecticut Avenue, N.W.
Suite 1000
Washington, D.C. 20036
(Counsel for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission

[1] The coordinates for Channel 269C3 at Temple are North Latitude 31-16-24 and West Longitude 97-23-33.

specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-30

In the Matter of

Amendment of Section 73.202(b), RM-8171
Table of Allotments,
FM Broadcast Stations.
(South Hill, Virginia)

NOTICE OF PROPOSED RULE MAKING

Adopted: February 9, 1993; Released: March 5, 1993

Comment Date: April 26, 1993
Reply Comment Date: May 11, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Old Belt Broadcasting Corporation ("petitioner"), licensee of Station WSHV-FM, Channel 255A, South Hill, Virginia, requesting the substitution of Channel 255C3 for Channel 255A at South Hill and modification of petitioner's license for Station WSHV-FM to specify operation on the higher powered channel. Petitioner states that it will apply for Channel 255C3, if allotted.

2. We believe the public interest would be served by proposing the substitution of Channel 255C3 for Channel 255A at South Hill, since it could provide the community with a wide coverage area FM service. Channel 255C3 can be allotted to South Hill in compliance with the Commission's minimum distance separation requirements with a site restriction of 8.6 kilometers (5.3 miles) north to accommodate petitioner's desired site.[1] As requested, we also propose to modify petitioner's authorization for Station WSHV-FM to specify operation on Channel 255C3. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of Channel 255C3 at South Hill or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties. In addition, this proposal is contingent upon Station WLCQ-FM at Clarksville, Virginia, receiving a license to operate on Channel 252C3 in accordance with its outstanding construction permit (File No. BPH-920720IA). Therefore, we may not finalize this proceeding until the Clarksville station is licensed accordingly.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
South Hill, Virginia	255A	255C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **April 26, 1993,** and reply comments on or before **May 11, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Earl R. Stanley
Wilkinson, Barker, Knauer & Quinn
1735 New York Avenue, N.W.
Washington, D.C. 20006
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. IT IS ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Notice* by Certified Mail, Return Receipt Requested, to Clarksville Broadcasting Company, Inc., Highway 58 Box 983, Clarksville, Virginia 23927 (licensee of Station WLCQ-FM), and William Carlton Link, Route 1, Box 16, Highway 58 E, Lawrenceville, Virginia 23868 (permittee of Station WHFD-FM).

8. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Com-

[1] The coordinates for Channel 255C3 at South Hill are North Latitude 36-48-11 and West Longitude 78-08-45. Although the South Hill proposal is short-spaced to Station WLCQ-FM, Channel 252A, Clarksville, Virginia, and Station WHFD-FM, Channel 255A, Lawrenceville, Virginia, Station WLCQ-FM was modified effective April 20, 1992, to specify operation on Channel 252C3, in MM Docket No. 91-323. *See* 7 FCC Rcd 1793 (1992). Station WHFD-FM was modified effective January 15, 1993, to specify operation on Channel 288A, in MM Docket No. 92-128. *See* 7 FCC Rcd 7843 (1992). We will serve copies of this *Notice* on Station WLCQ-FM's licensee and Station WHFD-FM's permittee.

mission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-31

In the Matter of

Amendment of Section 73.202(b), RM-8162
Table of Allotments,
FM Broadcast Stations.
(Crescent North, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: February 9, 1993; Released: March 5, 1993

Comment Date: April 26, 1993
Reply Comment Date: May 5, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed on behalf of William E. Stamps, Sr. and Patricia R. Stamps, d/b/a Let's Talk Radio ("petitioner"), licensee of Station KPOD-FM, Channel 250C3, Crescent North, California, requesting the substitution of Channel 250C2 for Channel 250C3 at Crescent North, and modification of the license for Station KPOD-FM accordingly to specify operation on the higher-powered channel. Petitioner stated an intention to apply for Channel 250C2 if allotted to Crescent North.

2. We believe the petitioner's proposal warrants consideration since it could provide the community with an expanded coverage area FM service. Channel 250C2 can be allotted to Crescent North, California, at the petitioner's specified site,[1] consistent with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules.

3. The petitioner's modification request conforms with the provisions of Section 1.420(g) of the Commission's Rules, and therefore, we shall propose to modify the license for Station KPOD-FM without entertaining competing expressions of interest in the use of Channel 250C2 at Crescent North, or requiring the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

4. In view of the above, the Commission believes it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the community listed below, as follows:

	Channel No.	
City	Present	Proposed
Crescent North, California	250C3	250C2

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **April 26, 1993,** and reply comments on or before **May 11, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Richard A. Helmick, Esq.
Cohn and Marks
1333 New Hampshire Ave., N.W.
Suite 600
Washington, D.C. 20036

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] Coordinates for requested Channel 250C2 at Crescent North are 41-48-25 and 124-10-16.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-208

In re Applications of

ATLANTIC RADIO COMMUNICATIONS	File No. BPH-900116MS
GREAT AMERICAN COMMUNICATIONS CORP.	File No. BPH-900117MN
JOHN SENIOR BROADCASTING CORP.	File No. BPH-900117MP
JERSEY DEVIL BROADCASTING COMPANY	File No. BPH-900117MT
SEAIRA, INC.	File No. BPH-900117MU
SOUTHERN OCEAN BROADCASTING CORP.	File No. BPH-900117MX
LD BROADCASTING LIMITED PARTNERSHIP	File No. BPH-900117NA

For Construction Permit for New
FM Station, Channel 289B1,
Manahawkin, New Jersey

ORDER

Adopted: February 22, 1993; Released: March 5, 1993

By the Commission:

1. The Commission has before it Petitions for Reconsideration of *Memorandum Opinion and Order* (*MO&O*), 7 FCC Rcd 5105 (1992), filed by Jersey Shore Broadcasting Corporation (Jersey Shore) and Press Broadcasting Company (Press) on September 9, 1992.[1] By this action we deny reconsideration of the *MO&O*. The *MO&O* granted an Application for Review filed by Seashore and vacated a Review Board decision[2] that dismissed for lack of standing Seashore's appeal of a decision of Administrative Law Judge Arthur I. Steinberg (ALJ).[3] It also vacated the ALJ's decision, which approved a settlement agreement among competing applicants for a new FM station in Manahawkin, New Jersey. Pursuant to the settlement, Press would receive the Manahawkin permit, but under an option agreement with Jersey Shore, it could ultimately swap the newly constructed Manahawkin facility for an existing Manahawkin facility licensed to Jersey Shore. Finally, the *MO&O* remanded the case to the ALJ for further action in accordance with the *Hearing Designation Order* (*HDO*) in this proceeding. The *HDO* had dismissed both the Press and Jersey Shore applications for violations of 47 C.F.R. § 73.3518, the inconsistent application rule.[4]

2. In its Petition for Reconsideration, Press again argues that dismissal of its Manahawkin application was error in the first instance because the Bureau wrongly concluded that Press' Ocean Acres, New Jersey application was still "pending" and therefore that its later-filed Manahawkin application was inconsistent and subject to dismissal under 47 C.F.R. § 73.3518.[5] Both Press and Jersey Shore argue that their applications were accompanied by requests for waiver of 47 C.F.R. § 73.3518 and that the Commission failed to duly consider these requests before dismissing the applications. They also again argue that Seashore, which had originally petitioned to deny the Jersey Shore application, did not have standing to participate in the proceeding once the Jersey Shore application was dismissed in the *HDO* and therefore its objections to the settlement agreement should not have been considered. Finally, they argue that consideration of Seashore's arguments was premature in any event because they concerned only Jersey Shore's "possible future interest" in the station through an option agreement. We fully considered each of these arguments in the *MO&O* and it is well settled that we will not grant reconsideration to debate matters upon which we have already deliberated and spoken. *WWIZ, Inc.*, 37 FCC 685 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F. 2d 824 (D.C. Cir. 1965), *cert. denied* 383 U.S. 967 (1966).[6]

3. For purposes of clarification, however, we turn to Press and Jersey Shore's argument that, even though their applications were dismissed, their participation in the ensuing settlement should have been permitted pursuant to the relaxed processing rules set forth in *Policy Changes in Processing of Commercial FM Construction Permit Applica-*

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[1] Also before the Commission is a Consolidated Opposition to Petitions for Reconsideration filed by Seashore Broadcasting Corporation (Seashore) on September 23, 1992 and Replies to the Consolidated Opposition filed by Jersey Shore and Press on October 5, 1992.

[2] *Memorandum Opinion and Order*, 7 FCC Rcd 486 (Rev. Bd. 1992).

[3] *Memorandum Opinion and Order*, FCC 91M-2893, released September 23, 1991.

[4] 6 FCC Rcd 4716 (1991). The parties entered into the settlement agreement contemplating the grant of the Press application, and Press and Jersey Shore entered into the option agreement, after adoption but prior to release of the *HDO* dismissing the Press and Jersey Shore applications. Despite the dismissals, the ALJ permitted the parties to save the settlement agreement by letting another applicant, LD Broadcasting Limited Partnership (LD), amend its application to substitute Press for LD and granting the LD application. He referred the Press/Jersey Shore option agreement to the Mass Media Bureau, where it was also approved.

[5] Section 73.3518 forbids the simultaneous prosecution of two applications both of which cannot be granted because they are inconsistent on their face or in the context of other rules.

[6] With respect to the standing and ripeness issues, we reiterate that "the circumstances of this case are unique." 7 FCC Rcd at 5105. Key to our decision here was the fact that the option agreement between Press and Jersey Shore, which, if exercised, would result in Jersey Shore becoming the licensee of the Manahawkin facility, was clearly an integral part of the proposed universal settlement agreement, which dealt with the interests of all of the filing applicants, including Jersey Shore. Since Seashore had established party-in-interest status vis-a-vis

tions for New Facilities, 5 FCC Rcd 990 (1990)(*Changes in Processing Policy*).[7] The parties correctly point out that the intent of *Changes in Processing Policy* was to promote settlement agreements in certain circumstances. Thus we announced therein that, for applicants previously dismissed for defects who propose to buy out all other mutually exclusive applicants in a group, including other dismissed applicants, we would waive the "hard look" rules to permit a curative amendment and reinstatement *nunc pro tunc* of the dismissed application for the limited purpose of terminating the matter by settlement. *Id.* at 991.[8]

4. However, as we noted in the *MO&O* in this proceeding, *Big Wyoming Broadcasting Corp.*, 2 FCC Rcd 3493 ¶ 6 (1987), clearly establishes that "a violation [of the inconsistent application rule] can never be cured by subsequent amendment because the act of filing cannot be undone." The parties' argument that the *Changes in Processing Policy* is more recent than *Big Wyoming* and thus supercedes the reasoning of that case is erroneous. In July 1992 we released *Amendment of Part 73 of the Commission's Rules To Modify Processing Procedures for Commercial FM Broadcast Applications*, 7 FCC Rcd 5074 (1992) (*Part 73 Amendment*) relaxing significantly the FM processing rules to permit curative amendments in many circumstances beyond those described in *Changes in Processing Policy*. However, in *Part 73 Amendment*, we again clearly stated:

> [U]nder our rules and policies certain defects related to the filing of broadcast applications are uncorrectable. For example, an applicant cannot cure through amendment the problems of premature or late filing, *inconsistent applications*, or failure to pay the required application fee. *See* 47 CFR Sections 1.1107, 73.3564(d), 73.3518 (footnote omitted)(emphasis added).[9]

Thus, though Press and Jersey Shore attempted to correct their violations of the inconsistent application rule in conjunction with the settlement agreement,[10] those violations were "irremediable"[11] and beyond the scope of the relaxed "hard look" provisions, including those that permit the remedying of defects for purposes of settlement. As we concluded in the *MO&O*, the public interest favors promotion of settlement agreements, but that goal cannot be pursued single-mindedly without regard for the orderly and efficient management of the Commission's processes.

5. ACCORDINGLY, IT IS ORDERED That, the Petitions for Reconsideration filed September 9, 1992, by Jersey Shore Broadcasting Corporation and Press Broadcasting Company ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Jersey Shore in petitioning to deny the Jersey Shore application, it continued to have party-in-interest status to object to all aspects of the settlement agreement. This conclusion, however, should not be construed as resolving standing and ripeness questions where the option provision is not an integral part of a universal settlement agreement or where the petitioner has not previously established its standing with respect to one of the parties to the settlement.

[7] Press and Jersey Shore further argue that the Commission's refusal to let them participate in this settlement is particularly unjustified in light of the fact that a violation of the inconsistent application rule does not necessarily implicate the applicant's character, but, as reflected below, this circumstance has no bearing on our disposition of this matter.

[8] Dismissal of the relevant application cannot be final, and the curative amendment cannot conflict with a previously filed acceptable application. *Id.*

[9] 7 FCC Rcd at 5078 ¶ 16. *See also, Notice of Proposed Rule Making, Amendment of Part 73 of the Commission's Rules to Modify Processing Procedures for Commercial Broadcast Applications*, 6 FCC Rcd 7265, 7268 ¶ 31 (1991) (proposed liberalization of rules concerning the acceptance of corrective amendments "would by no means permit corrective amendments for every type of defect that might arise").

[10] Jersey Shore requested the dismissal of its petition for reconsideration of the *HDO* dismissing the Manahawkin application, which had been inconsistent with a pending application for a Tuckerton, New Jersey station. Press requested the dismissal of its petitions for reconsideration in both the Manahawkin and Ocean Acres proceeding.

[11] *Big Wyoming* at 3495 n.8

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-226

In re Applications of

SALTAIRE COMMUNICATIONS, INC.	File No. BPH-880229NG
CHARLES S. FITCH, P.E.	File No. BPH 880301NW
WHSL CORPORATION	File No. BPH-880301OF

For Construction Permit for
New FM Station, Channel 299A,
Pawcatuck, Connecticut

MEMORANDUM OPINION AND ORDER

Adopted: February 22, 1993; Released: March 5, 1993

By the Commission:

1. We have under consideration the applications for review of the Review Board's decision in this case, 7 FCC Rcd 5164 (1992), filed by Charles S. Fitch and by the WHSL Corporation on September 14, 1992.[1] The Board granted the application of SaltAire Communications, Inc. and denied the competing applications of Fitch and WHSL. We agree with the Board's disposition of this case. However, comment is warranted concerning arguments raised by Fitch.

2. *Tenderability of SaltAire's application:* Fitch contends that there were deficiencies in SaltAire's application that rendered it non-tenderable and hence that the Mass Media Bureau erred in accepting it for filing. Fitch therefore asks us to dismiss SaltAire's application, citing *Processing of FM and TV Broadcast Applications*, 58 RR 2d 776 (1985), 50 FR 19936. Fitch's Exceptions to the Initial Decision did not point out with particularity any specific error in this respect as required by 47 C.F.R. 1.277(a), and any objection not saved by such an exception is waived. Fitch has not shown, anyway, that SaltAire's application contained defects of a kind that the Commission has held to be material to tenderability, *viz.*, the omission or patently incorrect entry of information identified as requisite in Appendix D to the *Processing* Report and Order, *supra*. The argument for dismissal because of alleged tenderability defects thus falls short of the mark.

3. *Acceptance of SaltAire's technical amendment:* Fitch maintains that the ALJ erred in accepting an amendment that SaltAire had submitted to rectify inaccuracies in the specified geographical coordinates of its transmitter site and the base elevation of its antenna tower. Fitch argues that the amendment should have been rejected as untimely because it was filed long after the correct information first appeared in public records and only after Fitch had called attention to the inaccuracies. This does not suffice to demonstrate reversible error, given the ALJ's undisputed findings that: (a) SaltAire's originally specified coordinates had been computed based on information supplied by the tower's owner for a co-located facility licensed by the Commission, had been checked against the Commission's own database, and had passed scrutiny by the Commission's Antenna Survey Branch; (b) that the amendment (which did not affect predicted coverage) would not result in a comparative upgrade; and (c) that acceptance of the amendment would not otherwise prejudice other parties. See FCC 91M-599, released Feb. 14, 1991.

4. *SaltAire's site certification:* Fitch also argues that the ALJ erred in refusing to add a site certification issue against SaltAire that Fitch raised in a petition to enlarge filed on December 4, 1990. Fitch tried to impugn the veracity of SaltAire's site certification by showing that a third party had an exclusive contractual right to lease the tower space that SaltAire proposed to use. To this end, Fitch produced documents indicating that the site owner's president, Gerald Goguen, had previously granted a binding option to a cellular radio firm, SNET, to lease all the space on the tower between the 135-foot and 165-foot levels, which seemingly belied SaltAire's representation that it had reasonable assurance that it could install its antenna at the tower's 140-foot level.

5. In response, SaltAire provided a declaration from Goguen asserting: that SNET's option was non-exclusive; that in intervening negotiations SNET had agreed to relinquish its right to lease tower space between the 135-foot and 165-foot levels and instead lease space between 150 and 180 feet; that SNET currently had no antennas below the 150-foot level; that SaltAire had contacted him in late 1987 or early 1988 concerning the possibility of installing an FM antenna on the tower; that he had consented to let SaltAire specify the tower as its transmitter site; and that SaltAire had subsequently paid an annual fee to reserve space on the tower. Fitch rebutted Goguen's statement by producing a copy of a letter from an SNET official stating: that SNET's option had been, in fact, for exclusive use of the space between 135 and 165 feet; that Goguen had informed SNET in May 1988 (several months *after* SaltAire had filed its application certifying the availability of the site) that he intended to replace the existing tower with a stronger one and had offered to lease it space on the new tower between 150 and 180 feet if it would refrain from installing its antennas on the old tower pending construction of the new one; that SNET had agreed to the proposal and had drafted a lease amendment embodying the agreement, which Goguen had signed several months later, but that SNET had accidentally misfiled the amendment and had never signed it; that SNET had recently found the unexecuted amendment and was preparing a request for permission from a state regulatory body to relocate its antennas to the 150-to-180-foot level of the new tower; and that SNET would sign the lease amendment and relocate the antennas once it received authorization for the proposed change. In

[1] We also have before us a consolidated opposition to the applications for review, filed by SaltAire Communications, Inc. on September 28, a reply filed by WHSL Corporation on October 14, 1992, and a motion to strike the reply filed by SaltAire on October 19. The reply is an unauthorized pleading and has not been considered. See 47 C.F.R. §1.115(d).

a supplemental filing, SaltAire submitted a marked photograph which purportedly indicated that no antennas had been installed on the tower below the 155-foot level and a letter from Goguen dated January 13, 1991 which alleged that SNET's antennas were currently installed at or above the 155-foot level and that the space allotted for SaltAire's antennas was currently available. In a supplement filed after the ALJ had denied his petition to enlarge, Fitch submitted official communications indicating that SNET did not receive permission to relocate its antennas until January 25, 1991 and that it completed the change on or before February 7, 1991.

6. The ALJ held that SNET had merely held a non-exclusive right to lease tower space in the first instance; that its option had been superseded by a lease of space above the 150-foot level; and that "there is no conflict between the placement of SNET's antennas at the tower's 155-foot level and SaltAire's plan to install an antenna at the 135-foot level." Fitch objects that this holding takes Goguen's allegations at face value while ignoring the evidence to the contrary that Fitch presented. Fitch also argues that the altitude and scale markings on the photograph that SaltAire submitted have no probative value, as they were not made by an engineer.

7. We agree with Fitch that the ALJ should not have relied upon Goguen's statements insofar as they were controverted as grounds for denying the petition to enlarge. Hence, we do not assume, for purposes of this ruling, that SNET's initial option was non-exclusive, that the option was superseded before SaltAire certified the availability of its proposed site, or that SNET moved its antennas before February 7, 1991. However, it was incumbent upon Fitch to demonstrate the need for adding the requested hearing issue and, because it did not file the petition in timely fashion and has not shown that there was good cause for the delay, the pertinent burden of persuasion is a heightened one. See 47 C.F.R. §1.229(c); see also *Evergreen Broadcasting Company*, 7 FCC Rcd 6601, 6602 ¶ 8 (1992). It has not carried that burden. It appears that there is no present impediment to implementation of SaltAire's plan to install its antenna on Goguen's tower, and there is no evidence before us that any of SaltAire's principals knew at the time of certification that Goguen had made a prior conflicting commitment to SNET or that they knew when SaltAire submitted Goguen's statements that any of his material assertions were false. We therefore affirm the denial of the petition to enlarge.

8. ACCORDINGLY, IT IS ORDERED that the motion to strike filed by SaltAire Communications, Inc. on October 19, 1992 IS GRANTED; that the applications for review filed on September 14, 1992 by Charles S. Fitch and WHSL Corporation ARE DENIED; that the application of SaltAire Communications, File No. BPH-880229NG, IS GRANTED; and that the competing applications of Charles S. Fitch and WHSL Corporation ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Licensing Under Title III of the Communications Act of 1934, as amended, of Non-common Carrier Transmit/Receive Earth Stations Operating with the INTELSAT Global Communications Satellite System — File No. ISP-92-002

DECLARATORY RULING

Adopted: February 12, 1993; Released: March 5, 1993

By the Commission:

I. INTRODUCTION

1. Brightstar Communications Limited (Brightstar) has requested that the Commission issue a declaratory ruling that it may be licensed under Title III of the Communications Act of 1934, as amended, (Communications Act), to operate an earth station to provide international television services via satellites of the International Telecommunications Satellite Organization (INTELSAT) as a non-common carrier. For the reasons discussed below, we find that the Commission has authority under Title III of the Communications Act to license transmit/receive earth stations in the International Fixed-Satellite Service to non-common carriers for the provision of international television services via the INTELSAT system, and that such licensing would, as a general matter, be in the public interest. Further, we find that Brightstar's proposed earth station use would be a non-common carrier offering. However, we do not make a decision to grant Brightstar any particular earth station license since that decision must be made within the framework of the application process.

II. BACKGROUND

2. Brightstar, a corporation organized under the laws of the United Kingdom, provides international transmission of television programming for customers between Europe and the United States via INTELSAT transponders leased from the Communications Satellite Corporation (Comsat) and British Telecommunications plc. Brightstar states all services are provided on a negotiated, customer-by-customer basis, and Brightstar maintains no public tariff for its operations. In the United States, Brightstar's customers include major distributors of television materials. These customers receive television materials from overseas points and retransmit them by terrestrial or domestic satellite means, edit them to create original programming, or retransmit them for use outside the United States. Brightstar does not attempt to broadcast television programming to the public at large in the United States.

3. Brightstar seeks a declaratory ruling that it may establish, through a U.S. subsidiary, its own earth station in Washington, D.C. to serve as its U.S. hub. The Brightstar U.S. hub would be comprised of two transmit/receive earth stations -- an international Ku-band facility operating via INTELSAT-K, and a domestic Ku-band facility capable of accessing the full range of space stations in the U.S. domestic orbital arc. Brightstar also plans to operate a number of receive-only earth stations at its U.S. hub. Brightstar's inbound video transmissions via INTELSAT-K would be distributed to Brightstar's U.S. customers either by direct reception to the customers' earth stations from the INTELSAT spacecraft or by means of retransmission from the Washington hub facility. Such retransmission within the United States would be effected by means of domestic satellite hops, microwave links, leased terrestrial private lines, or a combination thereof. Outbound video transmissions from Brightstar's U.S. customers would be transmitted to Brightstar's Washington hub, again either by domestic satellite link or via terrestrial microwave loops or leased lines, for uplinking to INTELSAT-K.

4. The Communications Satellite Corporation (Comsat), and, in a joint filing, Capital Cities/ABC, Inc., CBS Inc., National Broadcasting Company, Inc., and Turner Broadcasting System, Inc. (the Networks) filed supporting comments, reiterating the arguments discussed below which were first raised in Brightstar's petition.[1] The Networks add that by allowing foreign-owned, non-common carriers to own earth stations, we would promote more open access for U.S. telecommunications networks in overseas markets by demonstrating U.S. openness, thus facilitating U.S. corporations in their arguments for entry abroad and increased cooperation to operate earth stations in other countries. Pan American Satellite (PAS) filed opposing comments, arguing that: (1) Brightstar's proposal to operate as a non-common carrier makes it ineligible for INTELSAT earth station licensing; (2) Brightstar's request to be declared a non-common carrier is an attempt to circumvent the statutory ownership restrictions (Section 310(b) of the Communications Act); and (3) Brightstar incorrectly compares the regulatory treatment accorded the licensing of earth stations to operate with the INTELSAT system versus separate systems.[2] Reply comments were filed by Brightstar, Comsat, the Networks, PAS, and EuroCast Americas Corporation (EuroCast).

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[1] In addition, Comsat asks that the Commission use this declaratory ruling as a vehicle to eliminate the licensing requirements for international television receive-only antennas. We decline to do so here since that issue is currently under consideration in a separate rulemaking proceeding. *See* Amendment of Section 25.131 of the Commission's Rules and Regulations to Eliminate the Licensing Requirement for Certain International Receive-Only Earth Stations, CC Docket No. 93-23, FCC 93-89, adopted February 11, 1993.

[2] IDB Communications Group, Inc. filed comments styled as a petition to deny, but withdrew its petition on March 5, 1992.

III. DISCUSSION

5. Brightstar's request involves the Commission's authority to license transmit/receive earth stations operating with the INTELSAT system to non-common carrier entities. This issue was first addressed by the Commission in acting on a request for a declaratory ruling filed by Reuters. In its request, Reuters sought a determination that the Commission had the authority under Title III of the Communications Act to license non-common carrier earth stations for operation with the INTELSAT system, notwithstanding Section 201(c)(7) of the Communications Satellite Act of 1962 (Satellite Act).[3] In the *Reuters* declaratory ruling, the Commission determined that it has statutory authority to license transmit/receive earth stations operating with the INTELSAT system to non-common carrier entities for private use of INTELNET and International Business Services (IBS).[4] We held that the international earth station proposed by Reuters was not a "satellite terminal station" within the meaning of either Section 103(2) or 201(c)(7) of the Communications Satellite Act. Further, in the subsequent order granting Reuters' application for such an earth station, the Common Carrier Bureau specifically stated it would authorize the licensing of the station "provided that the station is operated on a non-common carrier basis for private use by the licensee and will not be operationally connected with the terrestrial communications system within the meaning of Sections 103(2) and 201(c)(7) of the Communications Satellite Act."[5]

6. Brightstar and the supporting commenters request the Commission to extend the principles of *Reuters* to permit the provision of international television services via the INTELSAT system by non-common carriers. In addition, we are asked to find that Brightstar is a non-common carrier, making Brightstar exempt from the statutory ownership restrictions under Title III of the Communications Act[6] that would apply to a license to operate a transmit/receive earth station to provide international television service via the INTELSAT system.

A. AUTHORIZATION OF NON-COMMON CARRIER EARTH STATION TO PROVIDE INTERNATIONAL TELEVISION SERVICE VIA INTELSAT

7. Since our *Reuters* ruling, the Commission has licensed only non-common carrier facilities to operate with the INTELSAT system that were proposed solely for the applicant's private use.[7] As a result, PAS argues that Brightstar's status as a non-common carrier providing service to others makes it ineligible for INTELSAT earth station licensing. We do not agree. As discussed below, we conclude that Section 201(c)(7) of the Satellite Act does not bar such an authorization. Further, we find that authorizing non-common carriers to provide international television service via INTELSAT is legally justified, and in the public interest.

8. *Satellite Act Restrictions.* In *Reuters*, we addressed the issue of what restrictions, if any, the Satellite Act placed upon us in terms of licensing earth stations for use with the INTELSAT system. We concluded that Section 201(c)(7) of the Satellite Act was not intended to limit the Commission's discretion, "but to make clear that the Commission has complete discretion to license satellite terminal stations' without Congressional prejudgment.[8] We further determined that the earth stations proposed by *Reuters* providing INTELNET and IBS services are not satellite terminal stations within the meaning of Section 201(c)(7). Therefore we concluded the Satellite Act does not limit our discretion to license such non-common carrier stations in the public interest under Title III of the Communications Act.

9. We conclude that the non-common carrier earth stations proposed by Brightstar also are not "satellite terminal stations" within the meaning of Section 201(c)(7). Hence, that section does not limit Brightstar's eligibility for a license. Section 103(2) of the Satellite Act defines a "satellite terminal station" as:

> a complex of communications equipment located at the earth's surface, operationally connected with one or more terrestrial communications systems, and capable of transmitting telecommunications to or receiving telecommunications from a communications satellite system.

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[3] Section 201(c)(7) provides that the Commission shall: "(7) grant appropriate authorization for the construction and operation of each satellite terminal station, either to the corporation [Comsat] or to one or more authorized carriers or to the corporation and one or more such carriers jointly, as will best serve the public interest, convenience, and necessity. In determining the public interest, convenience, and necessity the Commission shall authorize the construction and operation of such stations by communications common carriers or the corporation, without preference to either."

[4] *Licensing Under Title III of Private Transmit/Receive Earth Stations Operating with the Intelsat Global Communications Satellite System*, 3 FCC Rcd 1585, 1586 (1988)(*Reuters*), *aff'd TRT Telecommunications Corp. v. F.C.C.*, 876 F.2d 134 (D.C. Cir. 1989).

[5] *Reuters Information Services, Inc.*, 4 FCC Rcd 5982 (Com. Car. Bur. 1989).

[6] Section 310(b) of the Communications Act, 47 U.S.C. § 310(b). We agree with Brightstar and the supporting commenters that Section 310(b) is not a bar to foreign-ownership of radio facilities by non-common carriers. Section 310(b) was amended in 1974 to eliminate the restriction on alien ownership of private radio licenses. Pub. L. 93-505, 88 Stat. 1576; H.R. Report No. 93-1423, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 6305, 6307. Therefore, if Brightstar is found to be a non-common carrier, Section 310(b) would not apply to its application for an international earth station. Section 310(a)'s ban on licensing radio facilities to foreign governments or representatives thereof would still apply, of course, to applicants for international earth stations.

[7] *Reuters Information Services, Inc., supra; Burroughs Wellcome Co.*, 4 FCC Rcd 7190 (1989)(non-common carrier's proposed international earth station was for *intra-corporate* video teleconferencing only). *Compare Satellite Transmission and Reception Specialist Co.*, 5 FCC Rcd 4131 (Com. Car. Bur. 1990)(In denying a proposed license assignment from a common carrier to a non-common carrier because no transfer of control of the subject earth stations would actually occur, the Bureau also found that the applicant's proposal to operate the earth stations as a non-common carrier was inconsistent with *Reuters*, not specifically because the applicant was a non-common carrier, but because the subject earth stations would remain an integral part of a common carrier network).

[8] *Reuters*, 3 FCC Rcd at 1587, ¶14.

In *Reuters*, we stated that we have "long held that the terrestrial communications system' language in Section 103(2) refers to the networks of the then-existing U.S. international common carriers (AT&T and the [international record carriers])."[9] In support, the legislative history of the Satellite Act shows that the purpose of Section 201(c)(7) was to ensure that there would be no undue preference between the then-existing U.S. common carriers on the one hand and Comsat on the other hand in licensing the large earth stations that were to be connected to the terrestrial networks of U.S. common carriers.[10] Accordingly, we found that in Section 201(c)(7) Congress was addressing only those large earth stations which would become an integral part of the terrestrial networks of U.S. common carriers, and ruled that we could license transmit/receive earth stations to non-common carriers for use with INTELNET and IBS services.[11] The Court of Appeals affirmed this conclusion, and held that there is no statutory bar to the Commission granting licenses for non-common carrier earth stations that are not satellite terminal stations within the meaning of Section 201(c)(7).[12]

10. We conclude that our analysis in *Reuters* of "satellite terminal stations," under Section 201(c)(7), applies equally to all non-common carriers, whether using their facilities for private use (as was the case in *Reuters)*, or for providing service to others. That a non-common carrier connects a common carrier-supplied private line to its earth station does not alone make that earth station an integral part of a carrier's domestic common carrier network, and hence a "satellite terminal station."[13] To become an integral part of the carrier's network, the earth station would have to be used to exchange the carrier's common carrier traffic with the global satellite system.[14] As long as a non-common carrier's earth station solely carries non-common carrier originated traffic, it will not be a "satellite terminal station," and therefore not subject to the licensing restrictions of Section 201(c)(7) of the Satellite Act. Therefore, we conclude that the Satellite Act does not limit our discretion to grant international earth station authorizations to non-common carriers providing service to others if we find issuance of a license to be legally justified, and in the public interest under Title III of the Communications Act.

11. *Public Interest Considerations.* Having determined that the Satellite Act does not bar us from authorizing non-common carriers to provide service to others via the INTELSAT system, we must determine whether there are any public interest reasons that compel the provision of international television service over the INTELSAT system to be exclusively on a common carrier basis. Brightstar and the supporting commenters contend that the public interest considerations established in *Reuters* for the licensing of international transmit/receive earth stations to non-common carriers for INTELNET and IBS services apply equally to international television services.

12. In *Reuters*, we examined four policy factors to determine whether a particular service should be licensed to a non-common carrier user: (1) whether the user was permitted to take outbound space segment for the subject services directly from Comsat without an intervening carrier; (2) whether the subject services could adversely affect INTELSAT system efficiency; (3) whether the subject service could adversely affect the economic viability of carriers in that service in general; and (4) whether there was potential for harmful interference with other uses of the radio spectrum.[15] Applying these criteria, we find that non-common carrier earth stations providing international television service are analogous to those earth stations authorized to provide IBS and INTELNET services, and may be licensed in the same manner.

13. As to the issue whether these services may be taken directly from Comsat, the Commission since 1978 has granted the television networks and other television service consumers authorized user status to deal directly with Comsat.[16] Therefore, as we concluded with IBS and INTELNET services, it would be anomalous to find that a non-common carrier could take international television service directly from Comsat, but nevertheless require the entity to obtain earth station service from a common carrier that otherwise would have no operational role in the service. Thus, there is no policy reason to require such a "straw" carrier.[17]

14. We also conclude that allowing these services would not adversely affect INTELSAT system efficiency. In *Reuters*, we found that since IBS and INTELNET services were expressly designed by INTELSAT for multiple antennas and for location on a customer's premises, there was no need to limit the number of earth stations used or consider the possibility of adverse impact on INTELSAT system efficiency.[18] Our decision was based on our *Earth Station Ownership* order, where we already had concluded that, "with respect to *television* and IBS earth station applications," the issue of technical impact on the operation of the INTELSAT system is "generally irrelevant."[19] Therefore, our holding in *Earth Station Ownership* applies equally to international television service, as well as IBS service.

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[9] *Id.*

[10] *Id.* and n.19.

[11] *Reuters*, 3 FCC Rcd at 1587-88 and n.16.

[12] *TRT Telecommunications Corp.*, 876 F.2d at 145-46, 150. The U.S. court of appeals decision upholding *Reuters* also does not foreclose the instant authorizations. Without needing to reach whether Section 201(c)(7) was intended to limit the Commission's Title III authority to license any type of earth station to non-common carriers, the court concluded that "satellite terminal stations," as addressed in Sections 103(2) and 201(c)(7), at most encompassed those earth stations that would be an integral part of a common carrier's domestic network. The court further upheld the Commission's determination that Reuter's use of a common carrier-supplied private line did not make the earth station part of a common carrier's network. *Id.* at 152 and 141 n.6.

[13] *Reuters*, 3 FCC Rcd at 1587, and n.20; *TRT Telecommunications Corp.*, 876 F.2d at 152 and 141 n.6.

[14] *Reuters*, 3 FCC Rcd at 1587 and n.20.

[15] *Reuters*, 3 FCC Rcd at 1588.

[16] *Spanish Int'l Network*, 70 FCC 2d 2127 (1978)(*SIN I); Communications Satellite Corp.*, 76 FCC 2d 5 (1980); *Communications Satellite Corp.*, 79 FCC 2d 562 (1980); *aff'd ITT World Communications, Inc. v. F.C.C.*, 725 F.2d 732, 752 n.48 (D.C. Cir. 1984); *see also Proposed Modification of the Commission's Authorized User Policy Concerning Access to the International Satellite Services of COMSAT*, 100 FCC 2d 177, 205-206 (1985).

[17] *Reuters*, 3 FCC Rcd at 1588.

[18] *Id.*

[19] *Reuters*, at 1588 and n.25, *citing Earth Station Ownership*, 100 FCC 2d 250, 269 (1984)(emphasis added).

Furthermore, because the INTELSAT-K satellite Brightstar proposes to use is high-powered and operates in the Ku-band, it is ideally suited for small antennas and customer-premises video applications. Accordingly, we find that the provision of international television services would not adversely impact INTELSAT system efficiency.

15. Further, the authorization of non-common carrier earth stations providing television services should not affect the economic viability of common carrier earth stations using INTELSAT space segment. We have already concluded in our *Earth Station Ownership* proceeding that a loss by the common carriers of television service business would not adversely affect either the carriers' ability to provide other services or their price for other services since, like IBS, television service is a specialized offering distinct from INTELSAT's general offering of space segment capacity.[20]

16. Finally, we already found in *Reuters* that, from a technical standpoint, it is not necessary to limit operation of non-common carrier transmit/receive earth stations in order to carry out our duty to prevent harmful interference with other uses of the radio spectrum.[21] We found that non-common carrier-owned earth stations with transmit capacity would be licensed the same as common carrier-owned earth stations under Title III of the Communications Act and Part 25 of our rules. Furthermore, we found no reason to assume that non-common carrier users would be any more likely to violate our rules than common carriers since under Title III we have the same authority and power over all classes of users to order a cessation of violations.[22] Therefore, as in *Reuters*, we find here that licensing earth stations to non-common carriers for provision of international television service poses no greater risk of harmful interference with other uses of the radio spectrum than the licensing of these stations to common carriers.

17. In addition to the factors analyzed in *Reuters*, other considerations support allowing these services to be provided via INTELSAT by non-common carriers. First, though this service has traditionally been offered by common carriers, we believe that with the successful reboost of the INTELSAT VI (F-3) satellite on May 14, 1992, and the launch of the INTELSAT-K satellite on June 9, 1992, there is ample international television capacity via INTELSAT available to allow non-common carriers to provide this service without jeopardizing the access of the public to common carriage of this service.[23] Second, in the absence of any statutory restrictions, we find no other reasons to prevent the licensing of earth stations to non-common carriers for the provision of international television services via INTELSAT. We already license such earth stations to non-common carriers for use with separate satellite systems, and we have stated previously that we will not protect these separate satellite systems from competition. Separate satellite systems are private risk ventures that will succeed or fail on their own merits, not through Commission action that guarantees particular markets or services.[24]

18. A separate argument raised by the Networks is that grant of Brightstar's request is in the public interest because it will aid U.S. corporations seeking reciprocity from other countries in terms of more liberal earth station ownership policies. Brightstar notes that the U.K. government has liberalized telecommunications in the U.K. market, and granted a license to PAS for the provision of international transmission services by satellite. Brightstar states that the Commission should seize this opportunity to demonstrate a level of reciprocal treatment of a British telecommunications entity.[25] However, Brightstar's request is not market-specific, and the issue of reciprocity is not a factor in our ruling on Brightstar's request. Our declaratory ruling will apply equally to all non-common carriers, regardless of ownership.

19. For the above-stated reasons, we conclude that the licensing of non-common carriers to operate earth stations for the provision of international television service is legally justified, is supported by our decision in *Reuters*, and serves the public interest.

B. BRIGHTSTAR'S ELIGIBILITY FOR A LICENSE

20. We now address Brightstar's arguments that it is eligible to receive a license for such a transmit/receive earth station under Section 310(b) of the Communications Act. Brightstar states that it will be neither a broadcaster nor a common carrier, but instead will be a non-common carrier within the rationale of *Reuters*. This distinction is critical to Brightstar because if its subsidiary were found to be a broadcaster or common carrier, it could be ineligible for an earth station license under the statutory alien ownership restrictions, Section 310(b)(4) of the Communications Act.[26] Therefore, we first address Brightstar's and the supporting commenters' arguments that Brightstar is not a broadcaster.

21. Since adoption of the Communications Act in 1934, the concept of a "broadcaster" under United States law has referred to a disseminator of "radio communications intended to be received by the public..."[27] Under Commission rulings interpreting this statutory concept, broadcasters are those entities that employ open-air transmissions of radio signals to reach the indeterminate public, as opposed to specific addresses.[28] Classically recognized forms of broadcast facilities in the United States include terrestrial television and radio stations. In each case, the determinative factor is the operator's dissemination of programming with the intent of reaching the public at large.

22. Brightstar does not fall within this broadcaster category of radio operators. Its business is intended to service specific commercial customers under private contract, not the public at large. Brightstar's transmissions are intended

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20 100 FCC 2d at 284.

21 *Reuters*, 3 FCC Rcd at 1588.

22 *Id.*

23 We note that we did not receive any comments, nor are we aware of any evidence suggesting, that there is a shortage of international television service capacity.

24 *See Communications Satellite Corporation*, 5 FCC Rcd 5952, 5954-5955 (1990).

25 *See* Brightstar Petition for Leave to File Supplemental Comment, filed March 5, 1992, and PAS's reply, filed March 16, 1992.

26 *See* n.6 , *supra*.

27 47 U.S.C. § 153(o).

28 *See Subscription Video*, 2 FCC Rcd 1001 (1987)(determining subscription television to be a non-broadcast service.), *aff'd National Ass'n for Better Broadcasting v. F.C.C.*, 849 F.2d 665, 669 (D.C. Cir. 1988).

to be on a point-to-point or, at times, point-to-multipoint basis, and not over the air for reception by any individual with a properly tuned receiver. Thus, we find Brightstar is providing a non-broadcast service.

23. In support of Brightstar's claim that it is not a common carrier, Brightstar and the supporting commenters state that Brightstar's proposed network of domestic and international satellite stations will be private, and that its services do not meet the *NARUC I* common carriage test. [29] In *NARUC I*, the D.C. Circuit held that a common carrier is a quasi-public entity which undertakes to carry for all people indifferently.[30] In determining whether a carrier offers indiscriminate service to its particular clientele, the Court stated the Commission must "inquire, first, whether there will be any legal compulsion thus to serve indifferently, and if not, second, whether there are reasons implicit in the nature of [its] operations to expect an indifferent holding out to the eligible user public."[31]

24. In regard to the first part of the test, it is within our power to require an entity to provide a service as a common carrier if we have concerns regarding public access to the service.[32] For instance, we have examined if the market power of the entity proposing to provide the service as a non-common carrier is sufficient to limit the general public's access to the service.[33] In addition, we have considered the ability of potential users to represent themselves adequately in dealing with the proposed non-common carrier, with the assumption that mandatory common carrier status could provide protection in the form of a tariff and Section 214 application.[34]

25. There is no evidence in the record to indicate that public access to international television service provided over the INTELSAT system is limited,[35] or that Brightstar will possess sufficient market power to limit the public's access to the service. Therefore, we find no public interest basis legally to require international television service via INTELSAT to be provided by common carriers, or Brightstar to be a common carrier in this context.

26. In applying the second part of the *NARUC I* test, we examine Brightstar's proposed television service offering to determine if there are indications as to how Brightstar will offer these services to the public. In *NARUC I*, the Court stated that certain practices, or reasons to believe that such practices will occur, provide evidence that a service is being provided by a non-common carrier. These practices include making individualized decisions on whether and on what terms to deal, the establishment of medium-to-long term contracts, and the existence of a stable clientele.[36] Here, Brightstar states it does not, and will not, hold itself out to the public indifferently to carry whatever television transmissions come its way. All Brightstar agreements with customers are negotiated on a case-by-case basis and vary according to rate, time and frequency of transmission. Brightstar maintains no public tariff for its operations. Each arrangement is negotiated in the context of how it will be accommodated in relation to those of all other customers. Moreover, Brightstar actually becomes involved in the reformatting of its customers' television materials, upon request, in order to accommodate different broadcasting standards in the United States and overseas. Brightstar also leases the facilities of common carriers on both a long-term and *ad hoc* basis in order to provide end-to-end private network services designed to fulfill the requirements of each customer. Further, Brightstar states it will comply with the restrictions imposed on separate satellite system operators, which have been authorized as non-common carriers.[37]

27. After reviewing Brightstar's proposed communications network in relation to those previously found to be non-common carrier, it appears Brightstar's provision of international television service should also be granted non-

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[29] *National Ass'n of Regulatory Utility Commission v. F.C.C.*, 525 F.2d 630 (D.C. Cir.) *cert. denied*, 425 U.S. 992 (1976)(*NARUC I*). Brightstar also argues that its proposed earth station is "private" by definition since it will be used solely for the transmission of television programming. In support, Brightstar contends that the Commission has created a new category of presumptively private international facility providers by requiring operators of international transmit/receive facilities offering international television and other services via separate satellite systems to be non-common carriers. Brightstar states when these carriers apply for licenses they are automatically accorded the benefit of non-common carrier status.

PAS disagrees with Brightstar's argument, and we concur. Brightstar's main premise that users of separate systems must be non-common carriers is inaccurate. In *Establishment of Satellite Systems Providing International Communications*, 101 FCC 2d 1046 (1985)(*Separate Systems Order*), *recon. denied*, 61 Rad. Reg. 2d (P&F) 649 (1986)(*Reconsideration Order*), *further recon.* 1 FCC Rcd 439 (1989) (*Further Reconsideration Order*) the Commission precludes only separate system licensees from being common carriers; the Commission did not restrict common carriers from using separate systems to provide common carrier services. In fact, the Commission has authorized earth stations to provide international television service via a separate system on a common carriage basis. *See, e.g.*, Application of IDB Communications Group, Inc., File No. CSG-89-074-P/L (June 27, 1991), Call Sign KA-286. Therefore, applicants are free to choose on what basis they will offer international television services over separate systems, as long as they abide by the requirements spelled out in the *Separate Systems Order*, as modified by *Permissible Services - U.S. International Separate Satellite Systems Order*, 7 FCC Rcd 2313, ¶ 7 (1992). We do not automatically determine non-common carrier status simply because an entity proposes to provide a particular type of service.

[30] *NARUC I*, 525 F.2d at 641-642.

[31] *Id.* at 642.

[32] *Id.* at 643.

[33] *See NorLight*, 1 FCC Rcd 132, 134 (1987); *LightNet*, 58 Rad. Reg. 2d (P & F) 182, 184 (1985); *Domestic Fixed-Satellite Transponders Sales*, 90 FCC 2d 1238, 1252-1253 (1982), *aff'd Wold Communications, Inc. v. F.C.C.*, 735 F.2d 1465 (D.C. Cir. 1984).

[34] *NorLight*, 1 FCC Rcd at 134.

[35] *See supra* ¶17.

[36] *NARUC I*, 525 F.2d at 643; *see, also Domestic Transponder Sales*, 90 FCC 2d at 1256; *Tel-Optik Limited*, 100 FCC 2d 1033, 1046 (1985); *LightNet*, 58 Rad. Reg. 2d (P & F) at 185.

[37] In particular, Brightstar states: (1) services will be restricted to international television transmissions not broadcast or intended for broadcast to the public; (2) all contracts for services will be negotiated on a long-term basis in conformance with the *Separate Systems Order* -- occasional television services may be offered in accordance with the minimum "requirements contract" term aspect of that Order and its progeny (*Reconsideration Order*, at 661-62; *Further Reconsideration Order*, at 441); (3) the licensee will be a subsidiary incorporated in the United States; (4) the licensee will not be owned or controlled by any foreign government; and (5) services provided by means of the Washington, D.C. teleport will not be interconnected with the public switched message network.

common carrier status. Further, since Brightstar provides neither broadcast nor common carrier services, we find Brightstar's proposed operation of an international earth station in Washington, D.C. not subject to the alien-ownership and -control provisions of Section 310(b) the Communications Act. However, we note that we reserve the right to change the regulatory status of a provider of any service to common carrier if, in the future, we find the licensee to be acting as such, or the public interest so requires.[38]

IV. CONCLUSION

28. Accordingly, we find that we have authority under Title III of the Communications Act of 1934, as amended, to license transmit/receive earth stations to non-common carriers to provide international television services over the INTELSAT system, and that such licensing would generally be in the public interest. Further, we find that a foreign-owned and -controlled carrier may be licensed to operate such a station provided it is a non-common carrier as defined herein. In addition, we find that Brightstar's proposed earth station use, as described in its petition, would be a non-common carrier offering. We do not consider whether the public interest will be served by authorization of any particular non-common carrier earth station for the provision of these services.

29. Accordingly, the request of Brightstar Communications Limited for a declaratory ruling that the Commission has the authority under Title III of the Communications Act to license to non-common carriers transmit/receive earth stations in the International Fixed-Satellite Service, with INTELSAT space stations as authorized points of communication, for use with international television service IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[38] *See, e.g., NorLight, Reconsideration*, 2 FCC Rcd 5167, 5168 (1987); *NARUC I*, 535 F.2d at 644.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

MATT PHILLIPS, JOEL KAY AND BEVERLY LOCKRIDGE, A PARTNERSHIP, D/B/A FM 104.9 BROADCASTING — File No. BPH-901218MD

For Construction Permit
for a New FM Station on Channel 285A
in Clemson, South Carolina

MEMORANDUM OPINION AND ORDER

Adopted: February 23, 1993; Released: March 5, 1993

By the Commission: Commissioner Duggan dissenting and issuing a statement.

1. The Commission has before it a petition for reconsideration filed on May 13, 1992, by FM 104.9 Broadcasting ("FM 104"), an applicant for a construction permit for a new FM station in Clemson, South Carolina. FM 104 seeks reconsideration of an action by the Chief, Audio Services Division, Mass Media Bureau ("Bureau") dismissing FM 104's application as inadvertently accepted for tender because the applicant failed to make the requisite local public notice certification. *Golden Corners Broadcasting, Inc. (Hearing Designation Order)*, 7 FCC Rcd 2301 (M.M. Bur. 1992).[1] For the reasons set forth below, we deny the petition for reconsideration and hold that the Bureau properly dismissed FM 104's application pursuant to our FM "hard look" processing rules, *Report and Order* in MM Docket No. 84-750, 50 Fed. Reg. 19,936 (May 13, 1985) ("*Hard Look Order*").[2]

2. On December 18, 1990, FM 104 filed its application for the Clemson, South Carolina allotment. On February 22, 1991, the application was accepted for tender. On April 10, 1991, Golden Corners Broadcasting, Inc., a competing applicant, filed a petition to deny the FM 104 application for failure to respond to the public notice certification requirement. With its opposition to the petition to deny, FM 104 submitted an affidavit stating that beginning on December 26, 1990, notice of its filing for the Clemson, South Carolina facility was published in compliance with 47 C.F.R. § 73.3580, the Commission's local public notice rule. FM 104 argued that its failure to respond to the public notice question was a minor inadvertent ministerial error that did not constitute grounds for dismissal. FM 104's application was thereafter dismissed in the *Hearing Designation Order* as inadvertently accepted for tender.

3. In its petition for reconsideration, FM 104 contends that the purpose of the *Hard Look Order* was to detect applications which contained fundamental errors at the initial stage in order to eliminate applications which would cause delays in processing, and that the initial processing of FM 104's application was completed when the error was discovered. FM 104 argues that since the error had been cured by the time it was discovered, the omission did not cause any delay in processing. FM 104 also asserts that the Bureau's dismissal was arbitrary because in other cases, the Commission has permitted applicants to submit an amendment correcting a minor ministerial error.

4. In the *Hard Look Order*, the Commission, seeking to deter the filing of carelessly prepared and unprocessable applications, adopted a "hard look" approach to processing FM broadcast applications. Pursuant to the "hard look" processing, applications are first studied to determine if they are substantially complete or tenderable. In Appendix D to the *Hard Look Order*,[3] the Commission listed elements that applications must meet to satisfy the tenderability requirement. Therein, the Commission identified the publication notice certification as a key element of tenderability. The Commission stated:

> [2.c.] *Compliance with the local public notice provisions of 47 C.F.R. § 73.3580.* It is important that local public notice occur. An informed local populace can bring to the Commission's attention information about the applicant or the facility proposal that might otherwise remain undetected. Thus, where local public notice is required, an applicant who fails to respond to the appropriate item of Form 301 will have its application returned as not sufficient for tender.

50 Fed. Reg., at 19,945. The Commission further stated:

> If any of the defects listed above are overlooked during the initial review and are found later in the process, the application will be returned as inadvertently accepted for tender and, if resubmitted, will not be accepted *nunc pro tunc*. Return of the application will void the application reference number inadvertently assigned and whatever rights of tender might have been associated with it.

Id., at 19,946. *See also, Taber Broadcasting Company*, 4 FCC Rcd 7892 (1989).

5. FM 104's argument that it should be able to cure this tenderability defect by an amendment is ill-founded. In *Star Signal Corp.*, 1 FCC Rcd 450, 450 (1986), the Commission returned a similar curative amendment as untimely

[1] The *Hearing Designation Order* designated for comparative hearing three other mutually exclusive applications. An opposition to the petition for reconsideration was jointly filed by two of those applicants, Golden Corners Broadcasting, Inc. and Clemson Broadcasting, Inc.

[2] The Commission recently modified the "hard look" processing rules, and made these rules effective August 7, 1992. *Report and Order, Commercial FM Broadcast Applications*, MM Docket No. 91-347, 7 FCC Rcd 5074 (adopted July 16, 1992). The Commission determined that applications filed prior to that date would continue to be processed under the rules in effect on the date of the application's receipt.

[3] The *Hard Look Order* is reprinted at 58 RR 2d 776 (1985). Appendix D to the *Hard Look Order*, which was also issued separately as a Public Notice, is reprinted at 58 RR 2d 166 (1985).

and stated that "[u]nder the new processing procedures, applicants may perfect the tenderability of their applications and retain window' status only by an amendment filed by the close of the applicable window." FM 104 did not remedy such defect before the filing window closed on December 19, 1990. *See also* 47 C.F.R. §§ 73.3522(a)(6) and 73.3564(a).

6. FM 104's argument that it had, in fact, provided public notice is irrelevant. We have repeatedly indicated in tenderability cases involving our certification requirements that it is the certification itself that must be present by the close of the filing window in order for processing to begin. *See, e.g., Fred R. Morton, Jr.*, 5 FCC Rcd 606 (1990), *RDH Communications Limited Partnership*, 7 FCC Rcd _____ (1992). In the *Hard Look Order* we made clear that our policy objectives were: "expediting service to the public and minimizing administrative costs. . . ." 50 Fed. Reg. at 19,938. The failure of an applicant, such as FM 104, to provide all of the information called for by the application form by the close of the filing window interferes with the staff's ability to expeditiously process applications and requires an unnecessary expenditure of Commission resources. Thus, the processing of FM 104's application would be contrary to our goals. *Saint Vrain Communications Co.*, 7 FCC Rcd _____ (1992).

7. FM 104 cites a number of cases in support of its claim that it should have been permitted to amend its application. However, all of these cases are distinguishable. First, *Community Coalition for Media Change v. FCC*, 646 F.2d 613 (D.C. Cir. 1980), and *Coast TV*, 102 FCC 2d 718 (Rev. Bd. 1985), cited by FM 104, are inapposite because both occurred long before the effective date of the FM "hard look" processing rules. Second, FM 104 relies on *George Henry Clay*, 5 FCC Rcd 317 (Rev. Bd. 1989), *recon. denied sub nom., Alabama Radio Movement, Inc.*, 5 FCC Rcd 2997 (Rev. Bd. 1990), in which the applicant was allowed to amend its application after the hearing process had begun, pursuant to 47 C.F.R. § 73.3522(b). Section 73.3522(b) allows applicants to correct minor ministerial mistakes once the hearing process has begun, with a showing of "good cause", as long as the hearing process is not disrupted. In neither case was a tenderability defect cured. Finally, FM 104 cites two cases in which the applicants had satisfied the Commission's requirements for tenderability. In *Key Broadcasting Corporation*, 2 FCC Rcd 3888 (M.M. Bur. 1987), the applicant had failed to furnish complete ownership information and was allowed to amend. Omission of the ownership information in question is not a tenderability defect and, thus, the case is inapposite. Similarly, its citation to the *Hearing Designation Order* in the instant case, in which another applicant was permitted to file an amendment addressing radio frequency radiation hazards, is to no avail because this too is not a tenderability defect.

8. FM 104's apparent contention that its certification failure could not constitute a serious tender defect because it was not discovered until after its application had been processed is also unavailing. This argument essentially amounts to a challenge to the "hard look" criteria set out in our *Hard Look Order* more than seven years ago. We affirm the dismissal of the FM 104 application.

9. Accordingly, for the foregoing reasons, IT IS ORDERED, That the petition for reconsideration filed on May 13, 1992 by FM 104.9 Broadcasting IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

DISSENTING STATEMENT OF COMMISSIONER ERVIN S. DUGGAN

In re Application of Matt Phillips, Joel Kay and Beverly Lockridge, a Partnership d/b/a/ FM 104.9 Broadcasting (Clemson, South Carolina)

The Commission's "hard look" standard for FM applications has routinely presented us with decisons that appeared harsh and legalistic. I have generally accepted those decisions, having come to the conclusion that the "hard look" was a painful necessity if our beleaguered staff was to face the flood of FM applications that began in the late 1980s.

"Hard look," however, should not mean hard-hearted. I cannot agree that dismissal is proper when an applicant has neglected to check the public notice certification box on the application form, but has, in fact, provided the required affidavit demonstrating actual performance under the Commission's Rules. I therefore dissent and can only add that I am glad the days of the "hard look" are over. *See Commecial FM Broadcast Applications*, 7 FCC Rcd 5074 (1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 93-36

In the Matter of

Tariff Filing Requirements for
Nondominant Common Carriers

NOTICE OF PROPOSED RULEMAKING

Adopted: February 19, 1993; Released: February 19, 1993

Comment Date: March 29, 1993
Reply Date: April 19, 1993

By the Commission:

I. INTRODUCTION

1. On November 13, 1992, the United States Court of Appeals for the District of Columbia Circuit, in reviewing a Commission order disposing of a complaint filed by AT&T against MCI, vacated the *Fourth Report* of the *Competitive Carrier* proceeding.[1] In so doing, the court invalidated the Commission's long-standing "forbearance" policy under which nondominant carriers -- carriers lacking market power -- were permitted to refrain from filing tariffs. While stating that it had no "quarrel with the Commission's policy objectives,"[2] the court found that the Communications Act did not give the Commission authority to adopt such a policy. As a result of the court's decision, nondominant carriers are now obligated to file tariffs with the Commission.

2. In the *Competitive Carrier* proceeding, the Commission found, as a matter of policy, that tariff regulation of carriers lacking market power was unnecessary and, in fact, harmful to competition.[3] We recently affirmed these policy findings in an order adopted on November 5, 1992. In light of these policy findings, we initiate this rulemaking proceeding in order to consider easing in the near term the existing tariff filing requirements for nondominant carriers. Specifically, we set forth a targeted proposal to streamline, to the maximum extent possible consistent with our statutory obligations, our tariff filing rules for domestic nondominant common carriers.

II. BACKGROUND

3. On August 7, 1989, AT&T filed a complaint against MCI alleging that MCI was violating Section 203 of the Communications Act by providing interstate telecommunications services to certain large business customers at rates and on terms and conditions not set forth in interstate tariffs. AT&T claimed that, notwithstanding the Commission's permissive detariffing rules, the plain language of Section 203 requires all carriers to file tariffs.

4. Recognizing that AT&T's complaint was, in effect, an attack on the legality of the *Competitive Carrier* permissive detariffing rule, with potentially important consequences for the entire telecommunications industry, we concluded that the issues AT&T raised should be addressed in a broader rulemaking proceeding rather than a two-party adjudication.[4] Accordingly, in an order adopted on January 24, 1992, we denied AT&T's plea for damages against MCI and dismissed the complaint insofar as it sought injunctive relief against MCI.[5] At the same time, we initiated a rulemaking proceeding to consider the legality of our permissive detariffing rule.[6]

5. On November 13, 1992, the United States Court of Appeals for the District of Columbia Circuit decided that the *Complaint Order* was unlawful. The court held that it was arbitrary and capricious for us to dismiss AT&T's complaint without determining whether MCI's activity violated Section 203 of the Act.[7] Also, the court found that we implicitly relied upon our permissive detariffing policy applied in the *Fourth Report* of the *Competitive Carrier*

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[1] AT&T v. FCC, 978 F.2d 727 (D.C. Cir. 1992), *rehearing en banc denied*, January 21, 1993 (*"Forbearance Decision"*).

[2] *Forbearance Decision*, 978 F.2d at 736.

[3] Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor (CC Docket No. 79-252) (*Competitive Carrier*), *Notice of Inquiry and Proposed Rulemaking*, 77 FCC 2d 308 (1979) (*Competitive Carrier Notice*); *First Report and Order*, 85 FCC 2d 1 (1980) (*First Report*); *Further Notice of Proposed Rulemaking*, 84 FCC 2d 445 (1981) (*Competitive Carrier Further Notice*); *Second Further Notice of Proposed Rulemaking*, FCC No. 82-187, 47 Fed. Reg. 17,308 (1982); *Second Report and Order*, 91 FCC 2d 59 (1982) (*Second Report*), *recon.*, 93 FCC 2d 54 (1983); *Third Further Notice of Proposed Rulemaking*, 48 Fed. Reg. 28,292 (1983); *Third Report and Order*, 48 Fed. Reg. 46,791 (1983); *Fourth Report and Order*, 95 FCC 2d 554 (1983) (*Fourth Report*), *vacated*, AT&T v. FCC, 978 F.2d 727 (D.C. Cir. 1992), *rehearing en banc denied*, January 21, 1993; *Fourth Further Notice of Proposed Rulemaking*, 96 FCC 2d 922 (1984); *Fifth Report and Order*, 98 FCC 2d 1191 (1984) (*Fifth Report*), *recon.*, 59 Rad. Reg. 2d (P&F) 543 (1985); *Sixth Report and Order*, 99 FCC 2d 1020 (1985) (*Sixth Report*), *rev'd* MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985) (*MCI v. FCC*).

[4] AT&T Communications v. MCI Telecommunications Corp., *Memorandum Opinion and Order*, File No. E-89-297, 7 FCC Rcd 807, 809 (1992) (*"Complaint Order"*).

[5] *Id.*

[6] Tariff Filing Requirements for Interstate Common Carriers, *Notice of Proposed Rulemaking*, CC Docket No. 92-13, 7 FCC Rcd 804, 57 Fed. Reg. 6487 (1992) (*"Notice"*). On November 5, 1992, we adopted an order in that proceeding reaffirming our decision in *Competitive Carrier* that domestic nondominant carriers subject to forbearance may, but need not, file interstate tariffs. Tariff Filing Requirements for Interstate Common Carriers, *Report and Order*, CC Docket No. 92-13, 7 FCC Rcd 8072 (1992) (*"Section 203 Order"*). This order was released on November 25, 1992. In light of the court's November 13 decision, we stayed the effectiveness of the *Report and Order* until further notice. Tariff Filing Requirements for Interstate Common Carriers, *Order*, CC Docket No. 92-13, 7 FCC Rcd 7989 (1992). *See infra* Section III.A.

[7] *Forbearance Decision*, 978 F.2d at 731-33.

proceeding as a substantive rule in dismissing the complaint. Considering the validity of that order, the court found that our permissive detariffing policy was contrary to Section 203 of the Act.[8] Accordingly, it vacated the *Fourth Report* and remanded the complaint proceeding to us.[9]

6. The Commission took various actions in the *Fourth Report* in the *Competitive Carrier* proceeding. It applied its existing permissive detariffing policy to several classes of carriers, including MCI. It was this permissive detariffing policy the court considered in its *Forbearance Decision*.[10] In the *Fourth Report*, however, the Commission also made other regulatory decisions affecting interexchange carriers. Specifically, the Commission declared several classes of carriers nondominant, applied "streamlined regulation" to all but one of these carrier classes, and gave newly streamlined or forborne carriers blanket Section 214 authority to install new facilities or remove existing facilities from service.[11] We regard these matters as unaffected by the court's decision.

III. TARIFF REGULATION OF NONDOMINANT CARRIERS

7. For better than ten years we have consistently found, as a matter of policy, that minimal tariff regulation of nondominant common carriers serves the public interest. In light of the court's specific decision that permissive detariffing lies outside our authority under the Communications Act, we now wish to consider near-term changes to our tariffing rules to implement these policy findings in this new environment.[12]

A. Past Policy Findings

8. The Commission initiated the *Competitive Carrier* proceeding in 1979 to examine the proper scope of regulation in the new era of competition.[13] The Commission proposed to apply different rules to different carriers depending upon the extent of their market power. "Dominant" carriers -- primarily AT&T and its then-affiliated Bell Operating Companies -- would continue to be subject to full tariff regulation.[14] For "nondominant" carriers, which lacked market power, the Commission proposed to reduce or eliminate many regulatory requirements.[15]

9. The Commission found in *Competitive Carrier* that market conditions rather than regulation controlled the lawfulness of rate levels and rate structures of such carriers. Because nondominant carriers lacked market power, the Commission concluded that if these carriers attempted to charge unjust and unreasonable rates in violation of Section 201(b) of the Communications Act,[16] or to discriminate unreasonably in violation of Section 202(a) of the Act, customers would simply move to other carriers.[17] The Commission therefore concluded that the absence of mandatory tariff regulation for nondominant carriers served the public interest.[18] Based on these policy findings the Commission first adopted "streamlined" tariff regulation,[19] and later permissive detariffing, for domestic nondominant carriers.[20] On November 5, 1992, prior to the invalidation of permissive detariffing by the Court of Appeals, we adopted the *Section 203 Order*. There we reaffirmed the key policy findings reached by the Commission in the *Competitive Carrier* proceeding.[21]

B. Growth of Competition in the Marketplace

10. Actual experience during a decade of permissive detariffing helps confirm that the Commission's permissive detariffing policy has played a substantial role in the development of competition in the interexchange market and the increased choices for customers with respect to carriers and prices.[22] In 1982, approximately a dozen long distance

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[8] *Id.* at 733-36.

[9] In lieu of forbearance, the streamlined tariff requirements adopted in the *First Report* of the *Competitive Carrier* proceeding once again apply to nondominant common carriers. These rules can be found in Part 61 of the Commission's Rules. *See* 47 C.F.R. § 61. On January 27, 1993, however, we issued a *Public Notice* stating that during the pendency of this rulemaking proceeding we do not intend to reject tariff filings from carriers affected by the court's *Forbearance Decision* for failure to comply with the technical requirements sections of our rules regarding the form of tariffs. Tariff Filing Requirements for Interstate Common Carriers, *Public Notice*, FCC 93-51 (released January 27, 1993). On February 2, 1993, we issued a *Public Notice* waiving for a limited period of time the fourteen day notice requirements set forth in Section 61.58(b) of the Commission's rules for filing of tariffs by nondominant carriers for services for which there were no tariffs on file. *Public Notice*, FCC 93-71 (released February 2, 1993).

[10] For a discussion of the *Competitive Carrier* proceeding, including the *Fourth Report*, see paras. 8-11, *infra*.

[11] *See Fourth Report*, 95 FCC 2d at 557-82.

[12] We note that the court, while holding permissive detariffing unlawful, stated that it had no "quarrel with the Commission's policy objectives." *Forbearance Decision*, slip op. at 17.

The rules changes proposed in this Notice would not apply to international nondominant carriers, which were never subject to permissive detariffing, or to cellular carriers, which have been found dominant. We streamlined our regulation of nondominant carriers providing international services and facilities in the *International Competitive Carrier* proceeding. International Competitive Carrier Policies, *Report and Order*, CC Docket No. 85-107, 102 FCC 2d 812 (1985), *recon. denied*, 60 R.R.2d 1435 (1986); *see also*, Regulation of International Common Carrier Services, *Report and Order*, CC Docket No. 91-360, 7 FCC Rcd 7331 (1992). Cellular carriers were declared dominant in the *Fifth Report* of the *Competitive Carrier* proceeding. *Fifth Report*, 98 F.C.C. 2d at 1204, n.41.

[13] *Competitive Carrier Notice*, 77 FCC 2d at 309.

[14] *Id.* at 318-28; *First Report*, 85 FCC 2d at 20-22.

[15] *Competitive Carrier Notice*, 77 FCC 2d at 313-14.

[16] 47 U.S.C. § 201(b).

[17] *Id.* § 202(a); *see Competitive Carrier Notice*, 77 FCC 2d at 334-38.

[18] *Competitive Carrier Notice*, 77 FCC 2d at 313-14, 358-59; *First Report*, 85 FCC 2d at 1-12; *Second Report*, 91 FCC 2d at 59-73.

[19] Under the streamlined rules, tariffs are presumed lawful and must be filed on fourteen days notice. Carriers do not need to file cost support.

[20] The permissive detariffing rules had been a cornerstone of the Commission's regulatory regime ever since their adoption.

[21] *Section 203 Order*, 7 FCC Rcd at 8078-79.

[22] In the *Interexchange Order*, we concluded based upon the extensive record in that proceeding, that competition had flourished since the *Competitive Carrier* decisions. *See* Competition in the Interstate Interexchange Marketplace, *Report and Order*, 6 FCC Rcd 5880, 5881-82 (1991).

carriers operated within the United States.[23] By March 1992, there were an estimated 482 carriers purchasing switched access from local exchange carriers.[24] Moreover, since 1984, overall interstate calling has grown at an annual rate of about 12%, with carriers other than AT&T posting an average annual growth rate in excess of 25%.[25] During the period between January 1984 and October 1992, AT&T's share, stated in minutes, of the interstate market declined from over 80% to just more than 60%,[26] while its rates for directly dialed interstate calls have also fallen substantially.[27] Several of AT&T's nondominant competitors have engaged in intensive capital investment programs to develop state-of-the-art fiber optic networks, and AT&T now has less than half of the long distance industry's fiber optic route miles.[28] This dramatic increase in the growth and strength of competition in the interstate interexchange marketplace must be attributed in part to our regulatory policies for nondominant carriers.

11. Competition in other service markets has also increased under our policy of permissive detariffing. For example, local exchange carriers (LECs) for many years faced little or no competition in their provision of interstate access services. Technological improvements, however, most notably fiber optics, have facilitated the development of competition in the provision of these facilities and services. Thus, while LECs still provide most interstate access services, fiber-based carriers, sometimes referred to as competitive access providers (CAPs), now provide access services in many parts of the country.[29] The development of competition in the provision of interstate access services has also benefitted from the lack of tariff regulation. Since their inception, CAPs have not been burdened by interstate tariff filing requirements.[30]

C. Proposed Rule Changes

12. Consistent with the overall policy findings made originally in *Competitive Carrier*, and recently reaffirmed in the *Section 203 Order*, we tentatively conclude that, as a matter of policy, existing tariff regulation of nondominant carriers inhibits price competition, service innovation, entry into the market, and the ability of firms to respond quickly to market trends. In particular, we tentatively conclude that some of our existing streamlined tariff filing requirements are unnecessary for, and burdensome on, nondominant carriers.[31] Accordingly, we initiate this rulemaking proceeding in order to consider easing in the near term the tariff filing requirements for nondominant carriers in a manner consistent with the Act.

13. Based on the policy findings above, we tentatively conclude that the public interest would be served in the near term by streamlining, to the maximum extent possible consistent with our statutory obligations, our tariff regulation of all domestic nondominant carriers. Specifically, we propose to allow nondominant common carriers to file their interstate tariffs on not less than one day notice. We also propose to reduce tariff content requirements for nondominant carriers by allowing such carriers to state in their tariffs either a maximum rate or a range of rates. Finally, we propose to require these carriers to file their tariffs and tariff revisions on three and one half inch floppy diskettes and to give them flexibility in formatting their tariff filings. We seek comment on these proposals. We also seek comment on whether any categories of nondominant carriers, such as nondominant wireless carriers, can and should be regulated differently than nondominant carriers generally.

1. Tariff Notice Requirements

14. Under our current rules for nondominant carriers adopted in the *First Report* of the *Competitive Carrier* proceeding, tariff filings of nondominant carriers are presumed lawful and must be filed on not less than fourteen days notice.[32] The notice period affords the Commission the opportunity, on our own motion or on a petition from an interested party, to investigate the lawfulness of tariffs before they become effective. Since the streamlined rules were adopted, however, the Commission has never invoked its statutory discretion to suspend and investigate nondominant carrier tariffs prior to their taking effect, and has only once rejected a nondominant carrier tariff.[33]

15. We tentatively conclude that the current fourteen-day notice period, although an improvement over longer notice periods, will have, in the absence of permissive detariffing, an anticompetitive impact on nondominant carrier competition. The advance notice period allows competitors time to begin, and possibly complete, development and implementation of a market response before the tariff be-

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[23] *See Trends in Telephone Service*, Industry Analysis Division, Common Carrier Bureau, FCC, at 30 & Table 19 (February 1992).

[24] *Summary of Long Distance Carriers*, Industry Analysis Division, FCC, at 6 & Table 1 (June 16, 1992). This number does not account for many resellers.

[25] *Trends in Telephone Service*, Industry Analysis Division, Common Carrier Bureau, FCC, at 34 (September 1992).

[26] *Long Distance Market Shares*, Industry Analysis Division, FCC, at 9, Table 3 (January 1993).

[27] *Trends in Telephone Service*, Industry Analysis Division, Common Carrier Bureau, FCC, at 13 (February 1992).

[28] *See* Competition in the Interstate Interexchange Marketplace, *Notice of Proposed Rulemaking*, 5 FCC Rcd 2627, 2633-34 (1990).

[29] Expanded Interconnection with Local Telephone Company Facilities, *Notice of Proposed Rulemaking and Notice of Inquiry*, CC Docket No. 91-141, 6 FCC Rcd 3259 (1991). In a recent order in the same proceeding, we took steps to promote increased competition by requiring certain LECs to offer expanded interconnection to CAPs and other interested parties. *See Report and Order and Notice of Proposed Rulemaking*, 7 FCC Rcd 7369 (1992).

[30] It has consistently been our policy that a carrier is nondominant unless the Commission has previously found it to be dominant. *See First Report*, 85 FCC 2d at 10-11; *see also* 47 C.F.R. § 61.3(t) (Commission rule defining "nondominant carrier" as: "A carrier not found to be dominant.") Because CAPs have not been declared dominant in any Commission order, we consider them to be nondominant common carriers. *See* Application of Teleport Communications, New York, *Memorandum Opinion and Order*, File No. 13135-CF-TC-(3)-92, 7 FCC Rcd 5986, 5987 (para. 14) (1992) (Teleport was described as a nondominant carrier).

[31] The Commission made a similar conclusion in the *Second Report*. *Second Report*, 91 FCC 2d at 60-61.

[32] The notice requirement for nondominant carriers filing tariffs is stated in Section 61.58(b) of our rules. 47 C.F.R. § 61.58(b).

[33] Capital Network Systems, Inc., Tariff F.C.C. No. 2, *Memorandum Opinion and Order*, 6 FCC Rcd 5609 (Com.Car.Bur. 1991).

comes effective. As such, the notice period delays the benefits customers receive from new offerings, and discourages carriers from taking pro-consumer actions. Accordingly, we propose to reduce the notice period required before tariffs may take effect to not less than one day.

16. We tentatively conclude that this proposed change will not hinder our ability to fulfill our responsibilities under the Act. We are fully empowered under Sections 4(i), 205, 403 and other sections of the Act to initiate investigations after a tariff becomes effective and to order any necessary relief. In addition, the Section 208 complaint process permits an aggrieved party to seek a determination of the lawfulness of a carrier's rates or practices and full compensation for any harm due to violations of the Act.

17. We also tentatively conclude that we have legal authority to implement this proposal. The Communications Act specifically grants the Commission authority, "for good cause shown," to "modify" the notice period for tariff filings "either in particular instances or by general order applicable to special circumstances and conditions.[34] Also, there is precedent for one day notice. The United States Court of Appeals for the Eleventh Circuit has sanctioned use of a one day notice period for certain rate decreases under Interstate Commerce Act language similar to that in Section 203 of the Communications Act.[35]

18. We recognize that in proposing a one day notice period for nondominant carriers, we would effectively eliminate pre-effective tariff review. We note, however, that Section 204 of the Act states that "the Commission *may* . . . enter upon a hearing concerning the lawfulness [of a filed tariff] . . ."[36] The appearance of the word "may" throughout this section of the Act is a strong indication that Congress intended the Commission to have discretion to refrain from pre-effective tariff review where it would not serve the public interest.[37] Accordingly, we tentatively conclude that adoption of a one day notice period for nondominant common carriers is consistent with Sections 203 and 204 of the Communications Act.

19. We seek comment on our proposal to allow interstate domestic tariffs of nondominant common carriers to become effective on not less than one day notice. In particular, we seek comment concerning our tentative conclusions about the benefits and drawbacks of the current streamlined tariff filing notice period applicable to services of nondominant carriers. We also seek comment on whether any alternative notice period would better serve the public interest. Also, we seek comment on our legal authority to adopt such a proposal.

20. Finally, we tentatively conclude that the rule changes proposed in this notice should not apply to the provision of operator services by nondominant carriers. Nondominant carriers providing operator services were not previously subject to permissive detariffing. Rather, these carriers are required to file informational tariffs for their operator services pursuant to Section 226(h) of the Communications Act.[38] We seek comment on this tentative conclusion.

2. Tariff Content Requirements

21. We propose to further reduce the tariff filing burdens on nondominant carriers by limiting the type of information we require to appear in tariffs.[39] Section 203(a) of the Act requires only that carriers file "schedules showing all charges for itself and its connecting carriers . . . and showing the classifications, practices, and regulations affecting such charges."[40] We propose to require nondominant common carriers to include in their tariff only the information required under this section of the Act.

22. We also propose to modify the rate information required by our rules. Currently carriers are required to prepare and file new schedules each time they wish to implement minor rate revisions. This requirement forces nondominant carriers to make repeated revisions, with attendant administrative costs. In light of our tentative conclusion that, as a policy matter, existing tariff filing requirements are unnecessary for, and burdensome on, nondominant carriers in the absence of permissive detariffing, we propose to allow nondominant carriers to state in their tariffs either a maximum rate or a range of rates. This proposal would eliminate the need for nondominant carriers to file new schedules whenever rate changes are either under the maximum rate or within specified ranges -- whichever is appropriate. Moreover, this proposal would lessen the potential for tacit collusion among carriers by withholding from competitors the exact rate being charged by competitors at any given time.[41]

23. We seek comment on the lawfulness of these proposals, and, in particular, on whether they comply with Section 203(a) of the Act. We also encourage parties to recommend additional or alternative means by which we may lawfully reduce the tariff filing burdens for nondominant carriers.

3. Tariff Form Requirements

24. The streamlined tariff filing requirements adopted in *Competitive Carrier* provide that nondominant carriers follow the same technical tariff filing requirements as dominant carriers. These rules were designed to facilitate the tariff review process by making the detailed tariffs required of dominant carriers easier to understand and making it easier to compare new filings to old. As such, they provide a substantial benefit in the case of dominant carrier tariffs which are subject to relatively stringent tariff review. These

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[34] 47 U.S.C. § 203(b)(2).

[35] Southern Motor Carriers Rate Conference v. United States, 773 F.2d 1561 (11th Cir. 1985).

[36] 47 U.S.C. § 204.

[37] In its decisions vacating the fourth and sixth *Competitive Carrier* orders, the United States Court of Appeals for the District of Columbia Circuit has stated that the use of the word "*shall*" in the Communications Act means that the Commission has no discretion to deviate from the requirement. *MCI v. FCC*, 765 F.2d at 1191; *Forbearance Decision*, 978 F.2d at 735. Conversely, then, the use of the word "*may*" in Section 204 must mean that Congress intended the Commission to have discretion not to perform pre-effective review.

[38] 47 U.S.C. § 226(h).

[39] Under our current streamlined rules, nondominant carriers filing tariffs do not have to file cost support information along with their tariffs. 47 C.F.R. § 61.38. Also, as part of our streamlined tariff regulations, tariff filings of nondominant carriers were found to be presumptively lawful. *First Report*, 85 FCC 2d at 31-33. We do not here propose to change either this rule or finding.

[40] 47 U.S.C. § 203(a).

[41] Customers would obtain exact rate information from carriers in the course of ordering service.

rules, however, may not be justified in the case of nondominant carriers whose tariffs do not require stringent review.

25. Accordingly, we tentatively conclude that our tariff form requirements for nondominant carriers are unnecessary. We therefore propose to modify substantially or eliminate the tariff form requirements for these carriers.[42] First, we propose to establish new rules for nondominant carriers and to modify the existing form requirements to state that these rules apply only to dominant common carriers. We propose to adopt the following form requirements for nondominant common carrier tariffs:

1. In order to facilitate the processing, storage, and availability of the scores of tariffs we expect to receive from nondominant carriers, we propose to require nondominant carriers to file tariffs and updates on a three and one half inch floppy diskettes that contain the complete tariff. We propose to require that updates be integrated into the complete tariff and that the entire tariff, as modified, be refiled on diskettes.

2. We propose to give carriers flexibility in indicating material that is new or changed. Carriers would be required to indicate in the tariff, in whatever way they prefer, that new or changed material is present.

3. We propose that, in lieu of formal transmittal letter requirements, carriers will be permitted to file a cover letter in a form of their choice. At a minimum, we propose to require that cover letters are 8 1/2 by 11 inches in size, that they identify the carrier, and that they briefly explain the nature of the filing and indicate the date and method of filing of the original of the cover letter.

4. We propose to allow carriers to state, in any form, the tariff charges and the classifications, practices and regulations affecting such charges required under Section 203(a) of the Act.

26. We tentatively conclude that because these technical form requirements have been imposed for administrative ease rather than to meet any statutory requirement, our proposals to modify those requirements for nondominant carriers are consistent with the Act. We seek comment regarding the costs and benefits of applying the current tariff form requirements to nondominant carriers. Furthermore, we solicit comments on the proposals set forth above and on any additional or alternative means of reducing the administrative burden on nondominant carriers.

4. How Filing is Made

27. The new tariff filing requirements proposed above for nondominant common carriers will, if adopted, necessitate new rules for making a tariff filing. Accordingly, we propose to adopt the following tariff filing rules:

1. Nondominant carriers must send a paper copy of the cover letter, fee form and fee to the Mellon Bank.

2. Carriers must file with the Secretary of the Commission a copy of the cover letter and tariff filing on diskette. This copy would be for the Commission's official records and would not be generally available to the public.

3. Carriers must also send a paper copy of the cover letter and one diskette to the Public Reference Room. This copy would be available for public reference.

4. Carriers updating tariffs already on file would file a paper copy of the cover letter and diskette containing the complete tariff, with the new or changed material inserted.

IV. CONCLUSION

28. For more than ten years, it has been our view that, as a policy matter, tariff regulation of domestic nondominant carriers -- those lacking market power -- is not necessary to serve the public interest and is, moreover, harmful to competition. Accordingly, for ten years, we permitted these nondominant carriers to refrain from filing tariffs under our permissive detariffing policy. Recently, the United States Court of Appeals for the District of Columbia Circuit found permissive detariffing inconsistent with Section 203 of the Communications Act. The court, however, did not object to the underlying policy objectives. In this Notice, we tentatively conclude that, in the absence of permissive detariffing, some of our existing streamlined tariff filing requirements are unnecessary for, and burdensome on, nondominant carriers that were subject to permissive detariffing. We propose, therefore, to consider easing in the near term the tariff filing requirements for domestic nondominant carriers in a manner consistent with our statutory obligations. Specifically, we set forth a targeted proposal to streamline, to the maximum extent possible, our tariff filing rules for nondominant common carriers, and we seek comment on the merits of this proposal.

V. PROCEDURAL MATTERS

A. Ex Parte Rules

29. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission Rules.[43]

B. Regulatory Flexibility Act

30. An initial Regulatory Flexibility Act Analysis is contained in Appendix B.

C. Authority

31. This action is taken pursuant to Sections 1, 4(i), 4(j), 201-205, and 403 of the Communications Act as amended; 47 U.S.C. §§ 154(i), 154(j), 201-205, and 403.

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[42] The rules changes we propose are stated in Appendix A.

[43] *See generally* Section 1.1206(a) of the Commission's Rules. 47 C.F.R. § 1.1206(a).

VI. ORDERING CLAUSES

32. Accordingly, IT IS ORDERED that NOTICE IS HEREBY GIVEN of the proposed regulatory changes described above, and that COMMENT IS SOUGHT on these proposals.

33. IT IS FURTHER ORDERED that pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules,[44] comments SHALL BE FILED with the Donna Searcy, Secretary, Federal Communications Commission, Washington, D.C. 20554 on or before **March 29, 1993,** and reply comments SHALL BE FILED with the Secretary on or before **April 19, 1993.** To file formally in this proceeding, parties must file an original and five copies of all comments, reply comments, and supporting comments. Parties wishing each Commissioner to receive a personal copy of their comments must file an original plus nine copies. In addition, parties should file two copies of any such pleadings with the Policy and Program Planning Division, Common Carrier Bureau, Room 544, 1919 M Street, N.W., Washington, D.C. 20554. Parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, the International Transcription Services, Inc., Suite 140, 2100 M Street, N.W., Washington, D.C. 20037. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

PROPOSED RULE CHANGES

PART 61 TARIFFS

Sec.

61.1 Purpose and application.
61.2 Clear and explicit explanatory statements

DEFINITIONS

61.3 Definitions
61.11-61.19 [Reserved]

GENERAL RULES FOR DOMESTIC NONDOMINANT CARRIERS

61.20 Method of Filing Publications
61.21 Cover Letters

SPECIFIC RULES FOR DOMESTIC NONDOMINANT CARRIERS

61.22 Composition of Tariffs
61.23 Notice Requirements
61.24-61.26 [Reserved]

General Rules for Domestic Nondominant Carriers

§ 61.20 Method of Filing Publications

(a) Publications sent for filing must be addressed to "Secretary, Federal Communications Commission, Washington, D.C. 20554." The date on which the publication is received by the Secretary of the Commission (or the Mail Room where submitted by mail) is considered the official filing date.

(b) In addition, for all tariff publications requiring fees as set forth in Part 1, subpart G of this chapter, issuing carriers must submit the original of the cover letter (without attachments), FCC Form 155, and the appropriate fee to the Mellon Bank, Pittsburgh, PA, at the address set forth in § 1.1105. Issuing carriers should submit these fee materials on the same date as the submission in paragraph (a).

(c) In addition to the requirements set forth in paragraphs (a) and (b) of this section, the issuing carrier must send a copy of the cover letter with one diskette containing both the complete tariff and any attachments, as appropriate, to the Secretary, Federal Communications Commission. In addition, the issuing carrier must send one diskette of the complete tariff and a copy of the cover letter to the commercial contractor (at its office on Commission premises), and to the Chief, Tariff Review Branch. The latter should be clearly labeled as the "Public Reference Copy." The issuing carrier should file the copies required by this paragraph so they will be received on the same date as the filings in paragraph (a).

§ 61.21 Cover Letters

(a) Except as specified in § 61.32(b), all publications filed with the Commission must be accompanied by a cover letter, 8 1/2 by 11 inches in size. All cover letters should briefly explain the nature of the filing and indicate the date and method of filing of the original of the cover letter as required by § 61.20(b).

(b) A separate cover letter may accompany each publication, or an issuing carrier may file as many publications as desired with one cover letter. Note: If a receipt for accompanying publication is desired, the cover letter must be sent in duplicate. One copy showing the date of receipt by the Commission will then be returned to the sender.

Specific Rules for Domestic Nondominant Carriers

§ 61.22 Composition of Tariffs

(a) The tariff must be submitted on a 3 1\2 inch diskette, formatted in an IBM compatible form using MS DOS 5.0 and Word Perfect 5.1 software. The diskette must be clearly labelled with the carrier's name, Tariff Number, and the date of submission. The cover letter must be submitted on 8 1\2 by 11 inch paper, and must be plainly printed in black ink.

[44] 47 C.F.R. §§ 1.415 and 1.419.

(b) The tariff must contain the carrier's name, and the information required by Section 203(c) of the Act. Rates may be expressed in a manner of the carrier's choosing and may include ranges or maximums.

(c) Changes to a tariff must be made by refiling the entire tariff on a new diskette, with the changed material included. The carrier must indicate in the tariff what changes have been made.

§ 61.23 Notice Requirements

(a) Every proposed tariff filing must bear an effective date and, except as otherwise provided by regulation, special permission, or Commission order, must be made on at least the number of days notice specified in this section.

(b) Notice is accomplished by filing the proposed tariff changes with the Commission. Any period of notice specified in this section begins on and includes the date the tariff is received by the Commission, but does not include the effective date. In computing the notice period required, all days including Sundays and holidays must be counted.

(c) Tariff filings of domestic nondominant carriers must be made on at least 1 day notice.

APPENDIX B

INITIAL REGULATORY FLEXIBILITY ANALYSIS

Reason for Action:

On November 13, 1992, the United States Court of Appeals for the District of Columbia Circuit invalidated the Commission's long-standing "forbearance" policy under which nondominant carriers -- carriers lacking market power -- were permitted to refrain from filing tariffs. As a result of the court's decision, nondominant carriers are now obligated to file tariffs with the Commission. This rulemaking is initiated in order to seek comment on a proposal to reduce the tariff filing burdens on carriers affected by the court's decision.

Objectives:

The Commission seeks to eliminate unnecessary and costly regulations placed upon nondominant carriers by streamlining our tariff filing requirements for such carriers to the maximum extent possible under the Communications Act.

Legal Basis:

This proposed action is taken pursuant to Sections 1, 4(i), 4(j), 201-205, and 403 of the Communications Act as amended; 47 U.S.C. §§ 154(i), 154(j), 201-205, and 403.

Reporting, Recordkeeping and Other Compliance Requirements:

The proposed rules are designed to ease the reporting, recordkeeping and compliance requirements for nondominant common carriers. Specifically, the Notice proposes to allow such carriers to file only the information required under Section 203 of the Act. The proposed rules would also eliminate the need for carriers to file tariff amendments for rate changes within a specified range. Finally, the proposed rules would require nondominant carriers to file tariffs on three and one half inch floppy diskettes, and eliminate many of technical tariff form requirements that apply to dominant carrier tariffs.

Description, Potential Impact, and Number of Small Entities Involved:

Any rule changes in this proceeding would affect all common carriers classified as nondominant by the Commission by changing the tariff filing requirements for such carriers. After evaluating the comments in this proceeding, the Commission will further examine the impact of any rule changes on small entities and set forth our findings in the Final Regulatory Flexibility Analysis.

Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives:

The Notice asks parties to recommend any alternative means of reducing the tariff filing requirements for nondominant carriers.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-10

In the Matter of

Provision of Access
for 800 Service

MEMORANDUM OPINION AND ORDER

Adopted: February 19, 1993; Released: February 22, 1993

By the Chief, Common Carrier Bureau:

1. In the *800 Data Base Rate Structure Order*, the Commission required all local exchange carriers (LECs) that offer 800 service to file tariffs offering 800 data base service by March 1, 1993.[1] Some LECs who do not own their own service control points (SCPs), however, may not be able to calculate their 800 data base service rates until they see the rates that they will have to pay to the SCP owners who will be handling their 800 data base queries. Since those who own SCPs are not required to file their rates until March 1, 1993, we conclude that we should permit LECs who do not own their own SCPs to delay the filing of their 800 data base services tariffs until March 5, 1993 to enable them to review the rates that they will pay.

2. Accordingly, IT IS ORDERED, that pursuant to Sections 1, 4(i) and (j), 201-205, 303(r), and 405 of the Communications Act, 47 U.S.C. §§ 151, 154(i) and (j), 201-205, 303(r), and 405, and pursuant to Sections 0.204 and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.204, 1.3, the Bureau, on its own motion, grants a waiver from the *800 Data Base Rate Structure* decision to permit LECs who offer 800 service, but do not own their own SCPs, to file their 800 data base service tariffs on March 5, 1993, if they require extra time to take into account the 800 data base rates charged by SCP owners.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

[1] Provision of Access for 800 Service, Second Report and Order, CC Docket No. 86-10, FCC 93-53 (released January 29, 1993) (*800 Data Base Rate Structure Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BellSouth Telecommunications, Inc. — Transmittal Nos. 73 and 93

Revisions to Tariff F.C.C. No. 1

ORDER

Adopted: February 22, 1993; Released: February 22, 1993

By the Deputy Chief (Policy), Common Carrier Bureau:

I. INTRODUCTION AND PLEADINGS

1. On November 25, 1992, BellSouth Telecommunications, Inc. (BellSouth) filed Transmittal No. 73 to revise its jurisdictional reporting requirements, maintenance of records, and audit provisions associated with interexchange carrier (IXC) customer reporting of percentage of interstate usage (PIU).[1] Transmittal 73 Description and Justification (D&J) at 1. The tariffxis scheduled to become effective on February 23, 1993.

2. On December 10, 1992, Allnet Communications Services, Inc. (Allnet), LDDS Communications, Inc. (LDDS), MCI Telecommunications Corporation (MCI), and Sprint Communications Company Limited Partnership (Sprint) filed petitions to reject or to suspend and investigate Transmittal 73.

3. *General terms and conditions.* The petitioners make some common arguments against these provisions. Allnet, Sprint and LDDS argue that the record maintenance procedures for IXCs are burdensome, claiming that BellSouth would require them to keep unnecessary call data. Allnet Petition at 8; Sprint Petition at 7; LDDS Petition at 3-4. Allnet and LDDS also contend that the arbitration provisions in Transmittal 73, designed to provide for a neutral arbitrator to resolve contested PIU audits, would preclude a customer from filing a complaint against BellSouth under Section 208 of the Communications Act, 47 U.S.C. § 208. Allnet Petition at 5; LDDS Petition at 5. These IXCs further believe that BellSouth should not impose a service discontinuance penalty for a customer's failure to comply with the results of a PIU audit. Allnet Petition at 11; LDDS Petition at 4-5. MCI and LDDS argue that Transmittal 73 is unreasonable because it permits retroactive billing adjustments for access charges even where there is only a minor deviation between the customer's reported PIU and its audit-derived PIU. MCI Petition at 3-4; LDDS Petition at 4.

4. In its December 23, 1992 opposition, BellSouth states that Transmittal 73 balances the rights of its IXC customers with the local exchange carrier's need to ensure accurate PIU reporting. BellSouth contends the record-keeping requirements in Transmittal 73 are not burdensome. It claims that a six month retention period is necessary to insure availability of data from a full report quarter. Moreover, says BellSouth, all information obtained for an audit is treated as proprietary and BellSouth and its customer will negotiate a proprietary agreement before the PIU audit begins. BellSouth Opposition at 7-8. It insists that the arbitration procedures in Transmittal 73 do not eliminate an IXC's rights under the Communications Act. An IXC unwilling to accept the decision of the arbitrator, says BellSouth, is not foreclosed from seeking redress from the Commission or the courts. *Id.* at 4-5.

5. In response to Allnet and LDDS, BellSouth argues that the provisions in Transmittal 73 for service discontinuance clearly state when this provision will apply and are a necessary deterrent to the extreme cases of non-compliance with PIU reporting requirements which BellSouth has encountered. *Id.* at 8-9. In response to LDDS and MCI, BellSouth argues that the billing adjustment provision is reasonable and may produce a debit or a credit to a customer account as determined by PIU audit results. It states that PIU reports are based on carrier estimates, a number which is less likely to represent actual usage than a number derived from an audit examination of all call detail records. Therefore, says BellSouth, it is not arbitrary to apply the results of a PIU audit to quarters which immediately precede or follow the test quarter. *Id.* at 10.

6. *Audit Requirements.* Allnet also protests the provisions in Transmittal 73 which require that an auditor selected by the customer must be approved by BellSouth. It believes that this provision essentially gives BellSouth veto power over the customer's choice of an auditor. Allnet Petition at 6-8. Allnet further argues that BellSouth's audit charge policy -- under which the carrier would charge the customer for the audit if the audit results indicate that the customer over-reported its PIU by 5 percent or more -- is unreasonable. This audit charge provision, says Allnet, also violates Section 203(a) of the Act, 47 U.S.C. § 203(a), because the charges are open-ended and are not listed in BellSouth's tariff. *Id.* at 2-4. Allnet further argues that Transmittal 73 does not contain cost support which Allnet believes is required under the Commission's price cap rules, 47 C.F.R. § 61.49. *Id.* at 4.

7. Sprint argues against BellSouth's proposal to initiate an annual PIU audit even when there is no dispute over the reasonableness of the customer's reported PIU. It believes BellSouth should only perform an audit to verify a customer's PIU if the reported PIU appears questionable. Sprint Petition at 3. Sprint opposes the requirements in

[1] Local exchange carriers lack the technical ability to measure jurisdictional usage for Feature Group A (FGA), Feature Group B (FGB), 700, 800, and 900 switched access services. For these services, BellSouth must obtain a PIU each calendar quarter from its IXC customers in order to allocate their usage of BellSouth services between the interstate and intrastate jurisdictions. *See* Determination of Interstate and Intrastate Usage of Feature Group A and Feature Group B Access Service, 4 FCC Rcd 8448 (1989), adopting Joint Board Recommendation Decision and Order, 4 FCC Rcd 1966 (1989). These orders addressed measurement and verification of interstate and intrastate usage of FGA and FGB services by IXCs for interstate and intrastate access charge billing and cost separation.

Transmittal 73 which require the customer's independent auditor to provide BellSouth with detailed supporting information. Sprint believes this requirement would compromise protection of the customer's proprietary data. It also insists that BellSouth should not be able to specify in detail what procedures the auditor should use in conducting the audit. *Id.* at 4-6.

8. In response to Allnet, BellSouth argues that it will not unreasonably withhold consent to an IXC's choice of a particular auditor. *Id.* at 5-6. BellSouth also asserts that a 5 percent error threshold, as the basis for requiring payment of audit expenses by the reporting IXC, is reasonable since it views 5 percent as a substantial discrepancy indicating a failure to apply the methodology prescribed in the *Jurisdictional Measurement Order*.[2] *Id.* at 3-4.It also maintains that Transmittal 73 does not violate Section 203 of the Act by charging the costs of an audit to an IXC in certain instances because the costs involved are not communications charges which must be specified in the tariff. BellSouth states that its current tariff language already provides that the costs of a PIU audit will be borne by the carrier or the customer or both. Contrary to Allnet's arguments, BellSouth also argues that the price cap rules do not apply to audit charges since the charges do not pertain to communications services. *Id.* at 3-4.

9. BellSouth further argues that Sprint is wrong to insist that a verification audit cannot be initiated absent a dispute over a reported PIU. BellSouth claims that the requirement of a formal dispute as a condition precedent to an audit would hamper BellSouth's efforts to assure accurate jurisdictional reporting of service usage. *Id.* at 11-12. BellSouth also believes it is entitled to require supporting documentation from customer selected auditors to insure that the methodology in the *Jurisdictional Measurement Order* is consistently applied by all auditors. *Id.* at 5-6.

II. DISCUSSION AND ORDERING CLAUSES

10. The Common Carrier Bureau has reviewed Transmittal 73, as modified, and the related pleadings.[3] We conclude that no compelling argument has been presented that the tariff revisions are so patently unlawful as to warrant rejection or that an investigation is warranted at this time.

11. Accordingly, IT IS ORDERED that the petitions to reject or to suspend and investigate BellSouth Tariff F.C.C. No. 1, Transmittal No. 73, filed by Allnet Communications Services, Inc., LDDS Communications, Inc., MCI Telecommunications Corporation, and Sprint Communications Company Limited Partnership, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief (Policy)
Common Carrier Bureau

[2] On February 19, 1993, BellSouth filed Transmittal No. 93 to revise this audit provision as proposed in Transmittal 73. In Transmittal 93, BellSouth now proposes to charge the customer for an audit if the audit indicates that the customer overreported its PIU by 20 percent or more.

[3] Transmittal 93 clarifies that a BellSouth customer can choose and pay for an independent PIU auditor, without BellSouth approval, if the auditor certifies that it will use appropriate methodologies in conducting the audit. It also modified the billing adjustment provision to indicate that the PIU resulting from the audit will be applied to the customer's usage for the quarter in which the audit is completed, the quarter prior to completion of the audit and the two quarters following completion of the audit. BellSouth further clarified that the arbitration provisions do not preclude a customer from filing a complaint at the Commission or in a court of law.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-125

In re Applications of

BENNETT GILBERT GAINES, File No. BR-880830UA
INTERLOCUTORY RECEIVER
FOR MAGIC 680, INC.

For Renewal of License
for Station WCBM(AM),
Baltimore, Maryland

BENNETT GILBERT GAINES, File No. BAL-881117EB
INTERLOCUTORY RECEIVER
FOR MAGIC 680, INC.
(Assignor)

and
WCBM MARYLAND, INC.
(Assignee)

For Consent to the Assignment
of License of Station WCBM(AM)
Baltimore, Maryland

MOUNT VERNON File No. BP-880901AD
BROADCASTING
Baltimore, Maryland

For a Construction Permit
for a New AM Station

APPEARANCES

Bennett Gilbert Gaines, Esq., the Interlocutory Receiver for Station WCBM(AM); *Martin R. Leader, Esq., Kathryn R. Schmeltzer, Esq., John K. Hane, III, Esq.*, on behalf of WCBM Maryland, Inc.; *Barry D. Wood., Esq.*, on behalf of Mount Vernon Broadcasting; and *Larry Miller, Esq.*, on behalf of the Mass Media Bureau, Federal Communications Commission.

DECISION

Adopted: February 11, 1993; Released: March 5, 1993

By the Review Board: MARINO (Chairman), and GREENE. Board Member BLUMENTHAL concurring in result.

Board Chairman MARINO:

1. Bennett Gilbert Gaines, the interlocutory receiver of Station WCBM(AM), Baltimore, Maryland, sought renewal of the station's license and its assignment to WCBM Maryland, Inc. (WCBM Maryland). Mount Vernon Broadcasting (MVB) filed a competing application proposing to establish a new broadcast station using the same radio facilities. After a trial type evidentiary hearing, Administrative Law Judge Frysiak (ALJ) released his *Initial Decision* (I.D.), 7 FCC Rcd 1976, on March 20, 1992. Based on his specific findings and conclusions, the ALJ resolved (a) an unauthorized transfer of control issue in favor of the receiver Gaines because "WCBM Maryland has at all times continued to operate the radio station at the request of Gaines and under his ultimate control," I.D., para. 88, and (b) a financial qualifications issue against MVB because its letter dated September 12, 1990 was not a *bona fide* commitment and did not provide the requisite reasonable assurance (*see* I.D., paras. 91-96, 43-57).

2. Oral argument was held August 14, 1992 on the parties' briefs and exceptions. Two decisional issues are presented by this case: (a) whether the ALJ erred in holding that WCBM Maryland did not assume control of the station without prior FCC approval; and (b) whether the ALJ erred in designating a financial issue for hearing against MVB and finding that MVB was not financially qualified. Oral Arg. tr. 2496. We affirm the ALJ, whose I.D. is supported by the factual record and controlling precedent. We turn first to the transfer of control issue and a brief summary of the ALJ's key findings of fact, which we hereby adopt.

I. TRANSFER OF CONTROL ISSUE

3. Station WCBM in Baltimore, Maryland was formerly licensed to Magic 680, which took the station off the air in the spring of 1988 because of financial difficulties. On July 21, 1988, Bennett Gaines was appointed Interlocutory Receiver for the station by the Circuit Court for Baltimore County, and on July 28, 1988, the Commission approved the assignment of license from Magic 680 to Gaines. Gaines, an attorney, had no previous broadcast experience, but had been involved in other insolvencies and worked with other receiverships, and had served as Chairman of the Banking, Business, and Bankruptcy Committee of the Bar Association. After the Receivership became the licensee of WCBM, he took control of the station's assets and returned the station to the air on August 28, 1988. I.D., paras. 5-6, Gaines Exh. 1, pp. 1-2; tr. 178-179.

4. Initially Gaines hired professional employees to run the station while he managed its assets. He discussed with them operating guidelines pertaining to programming, technical compliance, format, advertising, and other basic matters. As Receiver, Gaines was obligated to dispose of the assets of the Receivership for the benefit of the creditors, and to operate the station pending consummation of a transfer to a qualified buyer. Upon resumption of broadcasting by WCBM, Gaines began looking for a purchaser and permanent licensee. I.D., paras. 7-8; Gaines Exh. 1, pp. 2-3.

5. In the fall of 1988, Gaines began negotiating sale of the station with Nicholas B. Mangione, a local businessman, and on October 19, 1988, Gaines agreed to sell the station to WCBM Maryland, a company formed and owned by Mangione for the purpose of operating the station. At the same time, Metromedia Inc. (which had been the licensee prior to Magic 680 and still held a security interest

in most of WCBM's equipment and a lease on the transmitter site) agreed to sell its equipment and sublease the site to WCBM Maryland. Concurrently, Metromedia agreed to lease to Gaines the assets in which it held a security interest and which were used in the operation of WCBM. I.D., paras. 9-10; Gaines Exh. 1, pp. 4-5; WCBM Exh. 3, p. 1.

6. At the same time, Gaines was interested in arranging a consulting agreement as a means of operating the station in the interim until the purchase of the station could be approved by the Commission. The agreement that was worked out, which was dated October 19, 1988 and described as a "consulting and interim management agreement," was filed with the Commission together with the purchase agreement and the pending assignment application in this proceeding. The consulting agreement provides that:

> [T]he Consultant, WCBM Maryland, Inc., shall be deemed the agent of the Receiver for the purpose of assisting in the operation of WCBM, subject to the terms and conditions of the Agreement, the direction and control of the Receiver, and the rules and regulations of the FCC.

Gaines Exh. 3, pp. 1-2. In addition to WCBM Maryland agreeing to operate the station on Gaines' behalf and subject to his control, WCBM Maryland was also responsible for funding the operation of the station. Gaines Exh. 3, pp. 3-4.

7. Gaines met with Mangione and other persons who were selected to run the station and discussed programming, personnel, advertising policies, and administrative matters, and Gaines approved WCBM Maryland's plan for getting the station fully operational. Gaines also approved the format, budget, and personnel that Mangione had proposed. Gaines Exh. 1, pp. 5-6; WCBM Exh. 3, p. 2. Gaines also interviewed several members of "Mangione's team" at WCBM Maryland, including Frank Luber, Joseph Lombardo, Lee Case, and Tom Marr, before they were hired. Tr. 168-169. In November 1988, Gaines and Mangione met with the station's employees and both explained that Gaines was the Receiver and licensee in charge of the operation, and that they were running it for him. I.D., paras. 12, 14; tr. 322-323.

8. Although not involved in day-to-day programming decisions, Gaines has monitored the station to ensure that the program format he wanted has been followed. He has reviewed some monthly programming reports as well as some Issues/Programs lists, conferred with WCBM Maryland regarding programming matters, and vetoed programming he did not want. Generally, he has relied on station personnel to make specific programming decisions within the format guidelines he established. He has also received financial information and operational reports of the station. I.D., paras. 14-15, 29; Gaines Exh. 1, p. 6; tr. 73-80, 100-101, 110-111, 123, 457, 477-478, 1195, 1202, 1210, 1225-1228.

9. Gaines involved himself in the station's budgetary process in November 1988 and worked with Mangione and WCBM Maryland's accountant to plan the budget for 1989. He approved that budget. He also met in November 1988 to discuss a traffic reporting system which he then decided the station should have. He was not involved in the 1990 budget process because that budget carried out the policies he had set in 1988 and followed the 1989 budget. Gaines received financial reports for WCBM in 1990 and verbal reports in 1989. In addition, his paralegal had many contacts with WCBM Maryland and maintained all of the financial records of the Receivership. I.D., paras. 16, 30; tr. 126-128, 137-138, 141, 144, 404, 458-459, 594, 597.

10. Gaines also instituted the station's EEO program and then delegated responsibility for compliance with the program to WCBM Maryland. He also provided an employee manual for use at the station. An advertising policy was established for the station in 1988 and Gaines has had continuing involvement in it. He has been involved in the discussion of barter agreements and the discussion of equipment purchases undertaken by WCBM Maryland. I.D., paras. 17-19, 30. Apart from these activities, Gaines was not involved with the operation of the station on a daily basis. He visited the station only every couple of months. Gaines meets and speaks frequently with Mangione and his attorney, as well as with Luber and Lombardo, and while he is not generally involved with hiring and firing, he did get involved in a few decisions in this area, including the hiring and subsequent firing of the station's general manager, Myron Laufer. I.D., para. 28.

11. On the basis of his findings, the ALJ concluded that Gaines had lawfully delegated responsibility for day-to-day operation of the station to WCBM Maryland pursuant to the consulting agreement, but that he had continuously exercised ultimate control over WCBM's finances, personnel, programming, and other aspects of station operations throughout the term of the Receivership. I.D., para. 87. In its exceptions challenging these conclusions, Mount Vernon argues that control of WCBM shifted to WCBM Maryland in the fall of 1988, that the ALJ's conclusions to the contrary are based on the self-interested testimony of Gaines and Mangione, and ignore other evidence of disinterested witnesses. Specifically, Mount Vernon states that Gaines had no involvement in the preparation or adoption of the 1990 budget, that he violated Commission policy by improperly delegating responsibility for EEO compliance to WCBM Maryland, that he was not sufficiently involved in format or programming decisions, and that the consulting agreement itself constituted a transfer of control, and was not adhered to in any case. Br. at 18-22.

12. Section 310(d) of the Communications Act, 47 U.S.C. 310(d), prohibits the transfer of control of any broadcast station without prior Commission approval. Although there is no exact formula by which control can be determined, in deciding whether an unauthorized transfer of control has occurred, the Commission has traditionally looked beyond legal title or *de jure* control to determine whether the new entity or individual has obtained the right to determine the basic operating policies of the station. Although a licensee may delegate certain functions to selected agents or employees on a day-to-day basis, ultimate responsibility over essential station matters involving personnel, programming, and finances must remain in the hands of the licensee. *Salem Broadcasting, Inc.*, 6 FCC Rcd 4172 (1991); *Benito B. Rish*, 6 FCC Rcd 2628 (1991); *Southwest Texas Public Broadcasting Council*, 85 FCC 2d 713 (1981). Here, we agree with the ALJ that the preponderance of record evidence shows that ultimate responsibility for operating control of WCBM remained in Gaines' hands.

13. At the outset we reject Mount Vernon's charge that the ALJ "whitewashed" an illegal transfer (Br. at 20), and deny Mt. Vernon's request that we waive the page limita-

tions of 47 CFRh)1.277(c) in order to incorporate by reference material contained in approximately 60 pages of its proposed findings and conclusions (Br. at n.5). Under 47 CFR 1.277(c), parties must "point out with particularity" alleged errors in the I.D. and make specific hearing or exhibit page references in support of their exceptions. Mount Vernon has not done so and its general claim that the ALJ's findings contain errors does not meet this requirement. Furthermore, the Board has long held that incorporation by reference of proposed findings of fact is not acceptable. *Public Notice, Filing Exceptions and Briefs Before Review Board,* 69 FCC 2d 1193 (Rev. Bd. 1978). Finally, we have reviewed the ALJ's extensive findings and conclude that they are accurate and fully supported by the hearing transcript and exhibit citations provided in the I.D.

14. Mount Vernon's specific factual allegations, (Br. at 18-22 and para. 11 *supra)* do not support its proposed conclusion. Thus, on format and programming, Gaines initially directed the WCBM Maryland staff that he wanted a talk show format aimed at a certain segment of the listening audience and covering a broad range of subjects of interest to area residents. Gaines has monitored the station to insure that the format has been carried out, and the format he established has not changed. Tr. 77, 79, 397, 477-478. He has vetoed programming he thought inapproprite and the programs on the Issues/Programs lists prepared by WCBM Maryland comport with his understanding of what the programming should be. Tr. 73-74, 76-78, 88; Gaines Exh. 1, p. 6. That specific day-to-day programming decisions within the general guidelines have been made by WCBM Maryland personnel is consistent with the consulting arrangement, and the fact that Gaines did not receive program reports and Issues/Programs lists on a regular basis did not undermine his general directives on programming. Nor is Mount Vernon's reliance on *Benito B. Rish* apposite because, there, the licensee had no involvement whatever in or oversight of station matters, and had merely selected a lessee to run the station and had not even filed the lease with the Commission. *See also Liability of Benito Rish,* 7 FCC Rcd 6036 (1992).

15. Similarly, on EEO matters, Gaines instituted the station's EEO program and then delegated responsibility for compliance to WCBM Maryland. Contrary to Mount Vernon's claim, neither *Salem Broadcasting, Inc.* nor *Southwest Texas Public Broadcasting Council* expressly bars such a practice. And although Mount Vernon argues that Gaines relinquished control a few months after his initial involvement with the station in the fall of 1988, Gaines made sure that the station advertised for employees in a newspaper with minority circulation and has been told by WCBM Maryland that it has done so since April 1989. Tr. 353-354, 362. Similarly, while Mount Vernon states that Gaines had no role in the preparation or adoption of the station's 1990 budget, he was involved in the creation of the 1989 budget and the 1990 budget carried out the budgetary policies he was involved in setting in the fall of 1988. Tr. 126-128, 138, 594.

16. Mount Vernon's contention that the consulting agreement itself constitutes a transfer of control is belied by the record as well as the *Hearing Designation Order,* 5 FCC Rcd 2052 (1990), herein. At the time of the negotiations, Gaines circulated drafts of the proposed agreement to his communications counsel to be sure that it complied with Commission law, and WCBM Maryland did not assume any position in connection with operation of the station until Gaines understood from counsel that the agreement passed Commission muster. Tr. 472, 474. The agreement and the assignment application were contemporaneously filed with the Commission. Tr. 485-86; Gaines Exh. 1, p. 5. Upon review of these filings, the Commission, by its Mass Media Bureau, acting pursuant to delegated authority, stated as follows (*HDO,* 5 FCC Rcd at 2053, para. 6):

> As a general practice, the Commission's approval is not needed for such a consulting agreement. Rather, once all of the circumstances surrounding such an assignment are reviewed by the Commission, it looks to the consulting agreement for assurance that the proposed assignee is directly accountable to the receiver, and that the receiver retains control of the station's finances, policies, programming and management until the Commission approves the assignment. In reviewing the instant consulting agreement, it is clear that the consulting agreement provides for Receiver to retain such control.

17. Despite this express finding by the Commission that the agreement is permissible, Mount Vernon claims that WCBM Maryland undertook major purchases without consulting Gaines even though the agreement gave him control over purchases, and that, in finding no transfer occurred subsequent to the agreement, the ALJ improperly relied on the testimony of Gaines and Mangione to the exclusion of other disinterested witnesses. As to equipment, while Mangione decided what should be purchased, Gaines was involved in discussions about the equipment and obtained Metromedia's permission for improvements to the premises to accommodate Mangione's equipment used for the talk show format. I.D., para. 19; tr. 392-394. As to the testimony of "disinterested" witnesses, Mount Vernon is apparently relying on that of Myron Laufer, one-time general manager of WCBM, and Bernard McCain, a talk show host at the station, both of whom were dismissed from their employment. They were not informed at the time of their hiring that Gaines was the licensee and that WCBM Maryland was operating the station pursuant to the consulting agreement. They did, however, learn subsequently that Gaines was the receiver and licensee. While they believed Mangione was in charge of decision-making at the station, they did not know whether he consulted with Gaines about such decisions. I.D., para. 31. In weighing this testimony, the ALJ did not make explicit demeanor or credibility findings, but his twenty-seven paragraphs of detailed findings reflect that he placed heavy weight on the testimony of Gaines and Mangione which he obviously accepted as truthful.

18. We do not believe that the previously mentioned testimony of the dismissed employees on which Mount Vernon relies constitutes sufficient "extrinsic evidence" to contradict the ALJ's judgment, which is otherwise entitled to great weight since he is the only person to have observed all the witnesses. *See Tri-State Broadcasting Co., Inc.,* 5 FCC Rcd 1156, 1170 (Rev. Bd. 1990), and cases cited therein at paras. 99-100, *recon. denied,* 5 FCC Rcd 534 (1990), *rev. denied,* 5 FCC Rcd 6232 (1990); *Adlai E. Stevenson IV,* 5 FCC Rcd 1588, 1589 (Rev. Bd. 1990) (credibility findings of ALJ must be given considerable deference unless in irreconcilable conflict with the other record evidence). Moreover, the ALJ's findings in this regard do not contradict the overall inference to be drawn from this record

that Mangione was indeed making day-to-day decisions at WCBM, but that he acted pursuant to Gaines' general guidance and supervision.

19. In determining whether an illegal transfer has occurred, the Commission "emphasize[s] that our concerns are the basic policies and ultimate control of the station. Day-to-day operation by an agent or employee, guided by the policies set by the licensee are not inconsistent with the Act." *Southwest Texas Public Broadcasting Council*, 85 FCC 2d at 715 n.2 . Stated otherwise, professional service contracts which vest great operational authority in management employees are not impermissible. *See Blue Ribbon Broadcasting, Inc.*, 90 FCC 2d 1023, 1025 (Rev. Bd. 1982). While the Commission has advised prospective purchasers to avoid the dangers inherent in day-to-day participation in station affairs, it has also held that "[p]rospective purchasers or their principals have also been allowed to furnish funds and act in varying capacities in the operation of the station involved, under supervision of court appointed Trustees in Bankruptcy in order to assure continuance of service." *Phoenix Broadcasting Co.*, 44 FCC 2d 838, 839-840 (1973); *accord, Daniel Forrestall*, DA 93-128, released February 10, 1993 (Chief, Video Services Division).

20. We agree with the ALJ and the Mass Media Bureau (Br. at 17-18) that Gaines maintained ultimate control of WCBM and played a role in its operation consistent with his position as a court-appointed receiver. In sum, upon becoming receiver, he immediately placed the station back on the air and, being a non-broadcaster, hired a professional staff to run the station. He established basic operating guidelines for the station at that time. Consistent with his understanding of his fiduciary obligation to keep the station in full operation until he could permanently transfer the license to a qualified buyer, he contracted with WCBM Maryland pursuant to the consulting agreement to have the latter manage the station under his general direction and to finance WCBM's continued operation. He discussed with the consultant programming, personnel, advertising, and other policies, and explained his position as licensee and receiver. After WCBM Maryland became the consultant, Gaines was involved in financial, budgetary, equipment purchase, format, EEO, and other matters pertaining to running the station. While there is no question but that Gaines delegated day-to-day responsibility for WCBM's operation to Mangione and WCBM Maryland, he did so consistent with the consulting agreement, which was filed with the Commission contemporaneous with the assignment application, and within the confines of the Commission precedent summarized above. *See Blue Ribbon Broadcasting, Inc.*, 90 FCC 2d at 1026 (license not revoked where management contract delegating to prospective owner considerable authority to manage day-to-day operations of the station was filed with the Commission, and necessary element that allegedly illegal transfer was accompanied by deliberate attempt to conceal it through misrepresentation was absent); *compare Stereo Broadcasters, Inc.*, 87 FCC 2d 87 (1981) (license renewal denied where transfer of control effectuated through lease arrangement and subsequent actions were designed to evade and deceive the Commission), *with Deer Lodge Broadcasting, Inc.*, 86 FCC 2d 1066 (1981) (transfer of control where parties did not willfully intend to deceive the Commission does not result in license denial).

21. Finally, Mount Vernon excepts (Br. at 20 n.6) to the ALJ's *Memorandum Opinion and Order*, FCC 91M-407, released February 1, 1991, which rejected its request for issue enlargement based on an alleged failure by Gaines to file employment and ownership reports for WCBM. The record fully supports the ALJ's ruling that no issue was warranted (FCC 91M-407, at paras. 3-4). We therefore affirm verbatim the ALJ's ruling that:

> Mount Vernon claims that [an] issue...should be added because no Employment Report (FCC Form 395) was filed for radio station WCBM in 1989 or 1990, as required by Section 73.3612 of the Commission's Rules. However, on December 13, 1990, Gaines filed FCC Form 395's for WCBM covering the years of 1989 and 1990. They were filed late, but no prejudice to any party or the public has been demonstrated, and there is no evidence of misrepresentation or an intent to deceive the Commission by the late filing. Mount Vernon has identified no case in which a license renewal application was denied on such a basis. Since the oversight is not sufficient to deny the renewal application, and since the Commission no longer considers character matters on a comparative basis, the requested issue against Gaines is not warranted. In any event, Gaines' qualifications are not being compared in this proceeding. The *Hearing Designation Order* ("*HDO*") DA 90-348, released April 4, 1990, determined that it is WCBM Maryland's qualifications that are to be compared to Mount Vernon's.
>
> Mount Vernon claims that [an] issue...should be added because Gaines has not filed an Ownership Report (FCC Form 323) since 1988. There is no requirement that individual licensees file annual ownership reports (See Section 73.3615(a)). Because Gaines is a sole proprietorship he is not required to file an Ownership Report. Thus, after he filed his initial 1988 Ownership Report he was not required to file any additional reports. The requested issue is not warranted.

II. FINANCIAL QUALIFICATIONS ISSUE

22. A broadcast applicant has the burden of establishing its financial qualifications. 47 U.S.C. §308(b); *see Northampton Media Associates v. FCC*, 941 F.2d 1214 (D.C. Cir. 1991). To meet its burden of proof, Mount Vernon had to show sufficient financial resources to construct or acquire its radio facilities, and initially operate the station without revenues for three months. *Financial Qualifications Standards for Aural Broadcast Applicants*, 68 FCC 2d 407, 408 (1978). This financial test does not turn on the subjective intent of the applicant, but upon a narrower and more objective inquiry designed to determine if, at the time an applicant certified its financial qualifications, it had reasonable assurance of the required funds from a committed source. *See Sunbelt Limited Partnership*, 7 FCC Rcd 4394, at 4395 (Rev. Bd. 1992), *rev. denied*, FCC 93-52, released February 7, 1993, citing *Aspen FM, Inc.*, 6 FCC Rcd 1602, 1603 para. 8 (1991); *Texas Communications*, 7 FCC Rcd 3186, 3187 para. 7 (1992). Reasonable assurance does not require a legally binding agreement; however, there must be some meeting of the minds of the involved parties. *See Progressive Communications, Inc.*, 3 FCC Rcd 5758 (Rev. Bd. 1988), and numerous cases cited at 5759-5760. For example, if an applicant is proposing to lease or purchase its radio facilities and the owner has specified a certain

price, the applicant may not unilaterally assume a different price for those facilities. *See South Florida Broadcasting Co.*, 99 FCC 2d 840 (Rev. Bd. 1984), and *see also Dutchess Communications Corp.*, 101 FCC 2d 243 (Rev. Bd. 1985).

23. In its exceptions, Mount Vernon advances three major points against the ALJ's finding that it is not financially qualified. Br. pp. 6-9; 10-12; 13-18. First, Mount Vernon urges that: "The principal error below occurred in early 1991, when the ALJ added a financial issue against [it]. That act contravened the determination in the *Hearing Designation Order*, 5 FCC Rcd 2052 [1990] that [it] was financially qualified based on its plan to lease the WCBM transmitter site." (Br. p. 2). In essence, Mount Vernon argues that it "never disavowed the intent or ability to lease the site if a purchase proved less desirable or impossible." It relies on Commission policy that "the hearing officer is constrained to rule consistently with the *HDO*. *See Anax Broadcasting, Inc.*, 87 FCC 2d 483 at para. 11 and n.11 (1981); *Atlantic Broadcasting Co.*, [5 FCC 2d 717 (1966)]." (Br. p. 6).

24. We agree that where there has been a thorough consideration of a particular question in a designation order (*HDO*), the ALJ and Review Board are expected to follow the *HDO's* judgment as the law of the case. We also agree that in the face of a clear record showing thorough consideration of the particular question at the time of designation, the ALJ should not undo what was done in the *HDO*. *Fidelity Radio Inc.*, 1 FCC 2d 661 (1965). Here however, the Mass Media Bureau, which issued the *HDO*, responds that the presiding ALJ did not act inconsistent with the *HDO*, or transgress the Commission's policy when he added a financial issue *after* circumstances had changed during the course of the hearing. (Reply pp. 11-12). Our review of the record confirms the accuracy to the Bureau's factual analysis.

25. The record establishes that on September 1, 1988 Mount Vernon filed its application. At that time its sole owner, Richard V. Falcon, did not certify Mount Vernon's financial qualifications because of the refusal of Metromedia (which held a security interest in the facilities, see para. 5, above) to discuss with Falcon the terms upon which the transmitter site and radio equipment would be made available to it. I.D. para. 43. On September 6, 1989, more than a year later, Mount Vernon filed an amendment (its first) supported by Falcon's declaration under penalty of perjury in which he declared that he had still been unable to negotiate with Metromedia to lease or acquire its radio facilities, however he had: "Net liquid assets in excess of one million one hundred thousand dollars which exceeds my *bona fides* estimate of the cost either to lease the existing physical facilities of AM station WCBM, Baltimore, Maryland, or to construct a substitute directional antenna facility for this frequency (including costs incident thereto such as hearing fees), and to operate the station for three months without reliance on advertising revenues." At that time, as the ALJ later recognized, "No documentation was submitted" by Mount Vernon, "and none was required" by the Mass Media Bureau which processed the application. I.D. para. 91. Falcon's certification was accepted at face value by the Bureau and no financial qualifications issue was designated. *See HDO, supra*, 5 FCC Rcd at 2054 para. 12, 2055 para. 18.

26. Some five months after designation for hearing on April 6, 1990, Mount Vernon filed a second amendment to its application on September 26, 1990 indicating that "Metromedia's price for the WCBM facilities is $2.8 million." Falcon's declaration executed September 26, 1990 reported that (emphasis added):

> As stated in my Declaration of September 5, 1989 in connection with Mount Vernon's [first] Petition for Leave to Amend filed the following day, I have attempted for some time to enter into negotiations with Metromedia Company to lease or acquire the transmitting facilities of WCBM. Until recently, Metromedia's agents have been unwilling to deal with me concerning this matter. However, on or about September 11, 1990 I had a telephone conversation with Larry Greenwald, Metromedia's Baltimore counsel, who advised that Metromedia would be willing to make the transmitter site property, studio building, towers and all other transmitting studio and office equipment available to Mount Vernon Broadcasting. In a subsequent conversation, *Mr. Greenwald stated that Metromedia's price for the WCBM facilities is $2.8 million.* Obviously, the WCBM transmitting facilities are not available at this time because they are now occupied by WCBM Maryland, Inc. Any final arrangement for Mount Vernon to acquire the facilities therefore would depend upon the resolution of Metromedia's pending lawsuit in Maryland State court to eject WCBM Maryland, Inc. from the premises and the FCC's ultimately granting Mount Vernon's construction permit application.
>
> Mount Vernon is considering Metromedia's offer at this time. Although the ultimate purchase price Mount Vernon negotiates with Metromedia may be less than $2.8 million, *using that figure I obtained a letter from Performance Mortgage Company setting forth its willingness to extend to Mount Vernon Broadcasting a line of credit up to $2.8 million* for the construction, including site acquisition, and initial operation of the WCBM facilities. I have been personally acquainted with the principals of Performance Mortgage Company for some time and they are familiar with my personal financial profile.

The ALJ accepted the amendment including the $2.8 million letter from Performance Mortgage Company finding that: "Good cause exists for acceptance of that part of the amendment which reflects Mount Vernon's updating of its financial qualifications". *Memorandum Opinion and Order*, FCC 91M-3636, released November 16, 1990.

27. During the hearing, when "material questions of fact were raised about Mount Vernon's current financial qualifications", the ALJ added an issue, "To determine whether Mount Vernon is presently financially qualified." *Memorandum Opinion and Order*, FCC 91M-432, released February 5, 1991. In accordance with past precedent the ALJ ruled that the designated issue "included the question of whether Mount Vernon had reasonable assurance at the time it certified its financial qualifications on September 26, 1990. *See Shawn Phalen*, 5 FCC Rcd 2622 (Rev. Bd. 1990)". *Id, para. 5.* However, the ALJ *specifically excluded* from the hearing the question of whether Mount Vernon had been financially qualified, or misrepresented facts, when it *first* certified its application (on September 6, 1989) because those issues had been requested by WCBM Radio and denied in the *HDO*. *Id*, para. 7.

28. Thus, the record establishes that the ALJ did not permit any relitigation of the ruling in the *HDO* which was based upon Falcon's original September 1989 certification. That matter was held to be outside the scope of the hearing; however, the circumstances substantially changed in September 1990 and Falcon filed a second amendment presenting a new proposal to meet Metromedia's declared price of $2.8 million with "a line of credit of up to $2.8 million" from the Performance Mortgage Company. *See* para. 25, *supra*. When material questions of fact were raised about that new financial proposal, the ALJ was obliged by the Commission's Rule, 47 CFR §1.229, which implements 47 USC §309, to add an issue inquiring into Mount Vernon's current financial qualifications. We affirm the ALJ's ruling adding the financial issue and deny Mount Vernon's exception thereto.

29. Mount Vernon's second argument is that it never intended to abandon its previous proposal to lease the Metromedia facilities which had been considered in the *HDO* when it filed the second September 26, 1990 amendment. But, the controlling Commission financial standard requires an objective evaluation of circumstances and not the subjective intent of the applicant. *See* para. 22, *supra*. Here, the Bureau's line-by-line review of the September 1990 amendment, Bureau Reply, pp. 11-13, and Falcon's supporting declaration, which we have quoted verbatim in para. 25, *supra*, support the ALJ's finding that: "The amendment did not say anything about leasing the property." I.D., paras. 54 and 94. As the Bureau further notes, the record establishes that, from September 1989 until November 1990, there was no indication that Metromedia would agree to lease its facilities to Mount Vernon or any other party. In fact, we agree with the Bureau, that Falcon and "MVB knew all along that WCBM Maryland's deal with Metromedia involved a purchase of the facilities with the lease lasting only until the assignment could be approved. MVB's contention that a lease was always a possibility should be rejected as contrary to the record. Moreover, by September 1990, MVB had already concluded that constructing alternative facilities on a different site was not feasible. Accordingly, the only alternative available to MVB, and the alternative actually proposed by MVB, was to purchase the Metromedia site for $2.8 million." Bureau Reply, pp. 16-17. Nor did Falcon and Metromedia ever have any meeting of the minds about a potential lease or any of its terms. *See* I.D., para. 55; and Reply of WCBM, pp. 6-9.

30. To meet Metromedia's purchase price, Mount Vernon, in its September 1990 amendment, proposed to rely upon "a line of credit" of $2.8 million from Performance Mortgage Company. Falcon's declaration also stated that he was "personally acquainted with the principals of Performance Mortgage Company for some time and they are familiar with my personal financial profile." *See* para. 25, *supra*. When an applicant does not rely on a recognized financial institution as the source of its funds, the applicant must establish that at the time of certification it satisfied itself that the source of the funds has sufficient net liquid assets to meet its financial commitment. *See Sunbelt, supra*, citing *Aspen*, 6 FCC Rcd 1603 at para. 8, and *Texas FM*, 7 FCC Rcd 3187 para. 7.

31. After a full trial-type hearing was held on this matter (*see* I.D., paras. 46-53), the ALJ found that:

> The Performance letter must be deemed to be even less than an accommodation letter. Performance simply did not have the capability to make a loan of $2.8 million. Performance's Bittle admitted at hearing that his letter was not a commitment letter. Bittle acted as a broker. The only lender that Bittle contacted which expressed any interest in the loan was Citibank but Citibank never saw any of the financial data from Falcon. *Scioto Broadcasters*, 5 FCC Rcd 5158, 5160 (Rev. Bd. 1990), *aff'd*, 6 FCC Rcd 1893 (1991), has set down guidelines to determine whether a given financial proposal constitutes reasonable assurance of committed sources of funds. MVB has failed to meet any of these guidelines, which the Commission has deemed essential aspects of reasonable assurance of committed sources of funds. The most that can be said of Performance's posture is that it speculated that MVB might be able to secure a $2.8 million loan, but that did not constitute reasonable assurance.

I.D. para. 93. *Accord Salt Lake City Communications, Inc.*, FCC 93-48, released January 29, 1993 para. 11, ("narrow" exception where record established that lender "MESBIC is willing and, with near certainty, able to syndicate the loan with other MESBICs").

32. The ultimate conclusion that Mount Vernon did not have reasonable assurance and is therefore not financially qualified is fully supported by the factual record and controlling precedent. *See* I.D., paras. 92-95. In essence, Falcon (an experienced lawyer), who declared that he had been personally acquainted with Performance's principals for some time, did not take sufficient steps to ascertain that Performance had sufficient resources to meet its loan commitment when he certified in September of 1990 that the applicant was financially qualified based upon Performance's $2.8 million "line of credit". Thus, Mount Vernon failed to meet its burden of proof on the financial issue. *See Sunbelt, supra*, 7 FCC Rcd at 4396 para. 10, and cases cited therein.

33. Mount Vernon responds that it should have been permitted to withdraw the September 1990 amendment which was based upon the fatally flawed Performance letter because the Commission has consistently given applicants opportunity to withdraw suicidal amendments. Br., pp. 9-10. Procedurally, we note that this argument was not made at the hearing below and is raised for the first time in Mount Vernon's exceptions. On the merits, we agree with the Bureau that the argument lacks substance because the cases cited involved amendments prior to designation for hearing. Reply, pp. 14-15. After designation for hearing, Mount Vernon could replace its amendment only if, pursuant to 47 CFR §73.3522(b)(1), it could demonstrate good cause for a later-filed amendment. *See Cleveland Television Corp. v. FCC*, 734 F.2d 982, 965 n.2 (D.C. Cir. 1984).

34. In its third and final point, Mount Vernon does assert that the ALJ misapplied the good cause test when he denied its April 22, 1991 (third) financial amendment specifying a new source for the $2.8 million "required to purchase the WCBM transmitter tower." Br. pp. 13-18. "Good cause" requires a showing that the applicant acted with due diligence; that the proposed amendment was not required by the voluntary act of the applicant; that no modification or addition of issues or parties would be necessitated; that the proposed amendment would not disrupt the orderly conduct of the hearing or necessitate an additional hearing; that the other parties will not be un-

fairly prejudiced; and that the applicant will not gain a competitive advantage. *See Royce International Broadcasting Co. v. FCC*, 820 F.2d 1332, 1335 (D.C. Cir. 1987). *See also Dutchess Communications, supra*, 101 FCC 2d at 250 n.18. In *Aspen FM*, 6 FCC Rcd at 1603 para. 13, the Commission stressed that an essential part of good cause is a showing that the applicant had reasonable assurance of financing at the time of certification, and the Commission has been "increasingly stringent in enforcing this requirement." *See Georgia Public Telecommunications Commission*, 7 FCC Rcd 7996, 7998-7999 at para. 4 (1992). We agree with the ALJ that: "the crucial element of good cause here is diligence." I.D., para. 96. More specifically, we affirm the ALJ's decisional finding that "by virtue of not having reasonable assurance of its financing when it amended in September of 1990, MVB lacks a critical ingredient in a good cause showing for the acceptance of a further financial amendment. *See Aspen FM Inc., supra.*" I.D., para. 96.

35. In sum, Falcon's original financial certification on September 6, 1989 was based on his mere assumption that he could lease Metromedia's facilities. But shortly thereafter, he learned that Metromedia had agreed to sell the facilities to WCBM Radio for a higher price. This should have alerted him that his assumption about leasing the Metromedia property was questionable. Falcon failed to act until a year later, September 26, 1990, when notified that Metromedia's price was $2.8 million. His financial certification at that time was fatally defective because he failed to satisfy himself that Performance could finance his "letter of credit". Given this past record of defaults, Falcon failed to demonstrate good cause when he sought leave to amend the application on April 22, 1991, for a third time, some 32 months after the application was first filed, and 12 months after it was designated for hearing. Thus, MVB is not financially qualified.

36. ACCORDINGLY, IT IS ORDERED, that the application of Mount Vernon Broadcasting (File No. BP-880901AD) IS DENIED; that the application of Bennett Gilbert Gaines, Interlocutory Receiver for Magic 680, Inc. (File No. BR-880830UA) for renewal of license for Station WCBM(AM), Baltimore, Maryland, IS GRANTED; and that the application of Bennett Gilbert Gaines, Interlocutory Receiver for Magic 680, Inc. (Assignor) and WCBM Maryland, Inc. (Assignee) (File No. BAL-881117EB) for consent to assignment of license of Station WCBM(AM), Baltimore, Maryland, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Cellular Telecommunications
Industry Association

Petition for Waiver
of Part 61 of the
Commission's Rules

ORDER

Adopted: February 18, 1993; Released: February 19, 1993

By the Chief, Common Carrier Bureau:

1. On February 4, 1993, the Cellular Telecommunications Industry Association (CTIA) filed a petition for interim waiver of Part 61 of the Commission's Rules to simplify the tariff filing requirements applicable to all cellular carriers pending development of permanent rules and policies for the industry. CTIA Petition for Waiver of Part 61 of the Commission's Rules (filed February 4, 1993) (CTIA Petition) at 1.[1] CTIA argues that its request is necessitated by the recent Court of Appeals decision invalidating the Commission's permissive detariffing policy.[2] CTIA Petition at 1. CTIA contends that the recent court decision will have a unique impact on cellular carriers because cellular carriers are the only common carriers not yet classified as nondominant that have not been filing federal tariffs. CTIA insists that absent the requested waiver, cellular carriers arguably would be subject to all tariff form and content requirements which would amount to "regulatory overkill." *Id.* at 1-2. CTIA avers that strict adherence to the formal tariffing requirements that apply to dominant carriers would "dampen cellular competition and ill-serve the public." *Id.* at 2. CTIA's petition is unopposed.

2. For nondominant carriers generally, the Commission applies streamlined tariff treatment, which is distinguished from dominant carrier tariff treatment in three respects: (1) nondominant carriers file no Section 61.38 cost support; (2) nondominant carriers file tariffs on shorter, *e.g.*, 14 days', notice; and (3) nondominant carriers' tariffs are presumed lawful under Section 1.773 of the Commission's Rules. Recently, in response to the Court's decision, the Commission issued public notices permitting nondominant carriers that had not previously filed interstate tariffs to file on less than 14 days' notice for an interim period of 60 days, and announcing that technical tariffing rules affecting the formatting and content of tariffs would not be enforced against nondominant carriers.[3] CTIA's petition, if granted, seeks to put cellular carriers on the same footing as nondominant carriers except as to the presumption of a tariff's lawfulness.

3. CTIA argues that the reasoning underlying the Commission's decision to designate all interexchange carriers (except AT&T) as nondominant supports a finding that cellular carriers, to the limited extent they provide interstate services, should be accorded similar streamlined treatment during the interim period until definitive rules are adopted. *Id.*

4. Pursuant to Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3, the Commission may waive any provision of its rules or orders on its own motion or on petition "if good cause therefor is shown."[4] The party seeking the waiver must demonstrate that the rule is unjust as applied to the party given the unique circumstances of the situation.[5] We find that CTIA, with respect to most of the rule waivers requested, has justified grant of Part 61 rule waivers on an interim basis pending a final order disposing of its Petition for Declaratory Ruling and Rulemaking.

5. As a threshold matter, cellular's status as an interstate dominant carrier is obscured by the absence of any direct examination of the competitiveness of cellular service in the interstate communications market. The Commission has classified a cellular carrier's resale of terrestrial interstate services as a nondominant resale activity. While the Commission has concluded that cellular carriers are dominant in their provision of other interstate services, it did not base its conclusion on any market analysis.[6] As CTIA reports, cellular service was licensed in discrete markets, serving local communities, and gradually evolved to a service more regional and nationwide in scope as additional serving areas were licensed. At least initially, cellular systems only provided intrastate common carrier services, providing little basis for a decision on interstate tariffing practices. Only now, with the Court of Appeals' decision, is the full extent of interstate cellular services becoming a significant issue.[7]

6. Pending a final decision on the merits of CTIA's petition, we find that real harm could result from applying tariff filing rules governing dominant carriers to cellular carriers at this time. Since these carriers have not previously filed interstate tariffs,[8] there is a strong likelihood

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[1] On January 29, 1993, CTIA filed a Request for Declaratory Ruling and Petition for Rulemaking seeking, *inter alia:* (1) clarification of the scope of the federal tariffing requirement as applied to cellular carriers; (2) a declaration from the Commission that cellular carriers are non-dominant and therefore further streamlining of the tariff filing process for cellular carriers.

[2] *See AT&T Co. v. FCC*, No. 92-1053 (D.C. Cir. Nov. 13, 1992).

[3] *See Public Notice*, FCC No. 93-71, (February 2, 1993); *Public Notice*, FCC No. 93-51, (January 27, 1993).

[4] *See WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *cert. den ied*, 409 U.S. 1027 (1972) (*WAIT Radio*). *See also Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990) (*Northeast Cellular*).

[5] *See Northeast Cellular*, 897 F.2d at 1166, *citing WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), and *Industrial Broadcasting Co. v. FCC*, 437 F.2d 680 (D.C. Cir. 1970).

[6] *Fifth Report and Order*, 98 FCC 2d 1191, 1204 n.41 (1985).

[7] *See* CTIA Request for Declaratory Ruling and Petition for Rulemaking, Policies and Rules Pertaining to the Regulation of Cellular Carriers, filed January 29, 1993. *See also* MCI Petition for Rulemaking, Policies and Rules Pertaining to the Equal Access Obligations of Cellular Licensees, (filed June 2, 1992); FCC Public Notice, 7 FCC Rcd 4020 (1992).

[8] Some cellular carriers have filed limited tariff provisions

that detailed tariff filing requirements would be burdensome, and ultimately may be unnecessary if the Commission grants these carriers the relief requested in the petition. Also, cost support materials might provide competitors with access to information that is competitively sensitive. We conclude that before we require cellular operators to reveal these interstate costs, we should first address the issue of cellular's status as a dominant carrier on the merits. We also agree with CTIA that the administrative burdens that would be imposed on the cellular industry in forcing its members to comply with technical form and content rules is substantial when measured against the minimal need to enforce technical compliance with tariffing requirements. Because cellular carriers have generally not filed federal tariffs before and given the above factors, we find it is in the public interest to grant the requested waiver on an interim basis until the question of dominance is decided.[9] For the same reasons, we also decide that we will apply our policy of nonenforcement of technical rules to cellular carriers, even for rules from which CTIA did not specifically request relief.[10]

7. With respect to tariff filing notice periods, we will grant CTIA's petition to the extent that for a 60-day period from the release of this order, new tariffs, *i.e.*, those filed for the first time, can be filed on less than 45 days' notice. This is consistent with our interim treatment of nondominant carriers generally.[11] Pursuant to Section 203(b)(2) of the Communications Act, the Commission may modify the notice requirements for tariff filings. We decline to grant CTIA's request for ongoing authority to amend filed tariffs on one day notice, but we will permit transmittals amending tariffs to be filed on the same notice period as nondominant carriers' transmittals -- 14 days.

8. Accordingly, IT IS ORDERED that the petition for waiver of Part 61 of the Commission's Rules, Sections 61.38, 61.52(b)(1), 61.52(b)(2), 61.53, 61.54, 61.58 and 61.59, 47 C.F.R. §§ 61.38, 61.52(b)(1), 61.52(b)(2), 61.53, 61.54, 61.58 and 61.59, filed by the Cellular Telecommunications Industry Association IS GRANTED on an interim basis to the extent described herein.

9. IT IS FURTHER ORDERED that the petition for waiver of Part 61 of the Commission's Rules, Sections 61.58(d)(1)(i) and (ii), 47 C.F.R. §§ 61.58(d)(1)(i) and (ii), filed by the Cellular Telecommunications Industry Association IS GRANTED to the extent indicated herein effective upon release of this order for a period of 60 days from the release of this Order to permit new filings to be made on less than 45 days' notice.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

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governing the selection of an interexchange carrier. *See, e.g.*, CyberTel Cellular Telephone Company, 7 FCC Rcd 4351 (Com.Car.Bur. 1992).

[9] We also grant an interim waiver of Section 61.59 of the Commission's Rules, which requires that new rates or regulations be effective for at least 30 days before any changes are made. We agree that this rule can inhibit a cellular carrier's ability to modify its offering in response to competition.

[10] *E.g.*, Section 61.74 mandates that no tariff publication filed at the Commission may make reference to any other tariff publication or to any other document or instrument.

[11] *See Public Notice*, FCC No. 93-71, (February 2, 1993).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-503

In re Applications of

NUGGET BROADCASTING COMPANY	File No. BPH-890728MD
GEORGIA MOUNTAINS COMMUNICATIONS, INC.	File No. BPH-890728ME
KEVIN C. CROOM	File No. BPH-890728MG

For Construction Permit for a
New FM Station on Channel 282A
in Dahlonega, Georgia

Appearances

Georgette B. Andrews, pro se, on behalf of Nugget Broadcasting Company; *Christopher J. Reynolds, Esq.* on behalf of Georgia Mountains Communications, Inc.; *Robert S. Stone, Esq.* on behalf of Kevin C. Croom; and *Y. Paulette Laden, Esq.* on behalf of the Chief, Mass Media Bureau.

DECISION

Adopted: February 24, 1993; Released: March 5, 1993

By the Review Board: Marino (Chairman), Blumenthal and Greene.

Board Member Greene:

1. This proceeding involves the competing applications of Nugget Broadcasting Company (Nugget), Georgia Mountains Communications, Inc. (GMC), and Kevin C. Croom for authority to construct a new FM station in Dahlonega, Georgia. The only issue still in contention is the standard comparative issue. In an *Initial Decision* (*I.D.*), 7 FCC Rcd 4530 (1992), Administrative Law Judge Edward Luton (ALJ) found Croom to be the comparatively superior applicant. Specifically, he held that only Nugget and Croom were entitled to 100% quantitative integration credit and, that, as between them, Croom was ahead on qualitative enhancements and comparative coverage. Exceptions have been filed by Nugget and GMC and replies by all three applicants as well as the Chief, Mass Media Bureau. We have reviewed the *I.D.* in light of these pleadings and the hearing record (having determined that oral argument would not further assist us in deciding this case) and conclude that the ALJ's grant of Croom's application should be affirmed, albeit on somewhat modified grounds.

2. Initially, we agree with the ALJ that GMC, unlike its competitors, is not entitled to full quantitative integration credit, and therefore cannot prevail in this proceeding. GMC is a corporation whose outstanding stock is entirely owned by Paula B. Puckett (52%) and C. David Puckett (48%). The Pucketts are husband and wife. *I.D.*, paras. 18-19. Although the ALJ credited Mr. Puckett's proposal to be integrated full time as general manager, he declined to credit Ms. Puckett's proposal to serve as operations manager. He found that Ms. Puckett's proposed duties, rather than being managerial, as required in order to receive integration credit, will be predominantly clerical in nature. *I.D.*, paras. 48-50. We basically agree.

3. In her written testimony (GMC Exh. 2), Ms. Puckett stated that her duties as operations manager "will include supervision of, or participation in, logging, accounts receivable, advertising copy, co-op billing, advertising sales, personnel scheduling, recruitment and other matters." In her oral testimony, however, she amplified that she intended to perform the same duties she now has as accounting manager at GMC's AM station WKZD, Murrayville, Georgia (which GMC proposes to divest if it receives the FM grant here), which include accounting, billing, writing advertising copy, transcribing tapes for commercials, and preparing public service announcements. She will also prepare program logs and estimated that these duties alone would occupy her at least forty hours a week, and that she would delegate responsibility for any task she could not do herself. Tr. 318-322. Stating that "her oral testimony cannot be ignored," the ALJ declined to award her credit. *I.D.*, para. 49. While GMC concedes that some of Ms. Puckett's duties can be characterized as clerical, it argues that they also involve supervisory functions, and that the ALJ's determination ignores the realities of a small-market family-owned and operated station where she will be a controlling owner and corporate principal.

4. The Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 395 (1965), looks to the station positions participating owners will hold "in order to determine the extent of their policy functions and the likelihood of their playing important roles in management." While, in order to receive integration credit, the individual in question need not necessarily occupy a staff position to which the *Policy Statement* awards special weight, such as general manager, *id.* at 395, nevertheless, the applicant has the burden of showing its principal's involvement in and responsibility for a policy-making or management-level role. *Doylan Forney*, 5 FCC Rcd 5423, 5426 (1990) ("office manager and director of human resources and equal opportunity compliance" denied credit). Here, GMC's reliance on Ms. Puckett's general supervisory authority is too vague. *See id.* (statement that principal "will be responsible for supervising the administrative operation of the station and establishing and implementing station personnel policies and rules" held insufficient). While we agree with GMC that it would not be inappropriate or unreasonable for a principal at a small station to perform some non-managerial tasks, it appears from Ms. Puckett's own description at hearing that her duties will be largely non-managerial and non-policy-making. Because she estimated that these described duties would occupy her 40 hours or more a week, it is difficult to see how she could spend sufficient time on the supervisory or managerial aspects of her proposed role so as to warrant full-time credit. The cases GMC relies on to support the award of full credit are distinguishable because they involved principals holding positions recognized as important by the *Policy Statement*, or with sufficient authority and discretion. Thus, in *Tulsa Broadcasting Group*, 2 FCC Rcd 6124, 6128 (Rev. Bd. 1987), the individual had authority to hire and

fire employees, and shared responsibility for the public affairs and community relations divisions of the station; in *Vela Broadcasting Co.*, 2 FCC Rcd 3663, 3667 (Rev. Bd. 1987), the principal was the news director; in *Voce Intersectario Verdad America, Inc.*, 100 FCC 2d 1607, 161-1617 (Rev. Bd. 1985) the principal would be the sales manager; *Victorson Group, Inc.*, 6 FCC Rcd 1697, 1699 (Rev. Bd. 1991), involved a business manager responsible for all of the station's financial operations and supervision of the accounting department; and *Debra D. Carrigan*, 100 FCC 2d 721, 738 (Rev. Bd. 1985), credited a general manager who would also devote time to sales. Ms. Puckett's role is simply not comparable to those played by the principals in these cases, and even an award of some slight credit for her proposed role would take GMC out of the comparative running in this case. *Cf. Deep South Radio, Inc.*, 46 RR 2d 1657 (1980).[1]

5. In comparing the two remaining applicants, Croom and Nugget, we turn first to their qualitative enhancements since there is no challenge to the ALJ's award of 100% quantitative credit to both. Croom is a sole proprietor who will work full time as the station's general manager/sales manager. He was a local resident of Dahlonega from March 1982 to October 1983 and has lived in the service area since 1983. *I.D.*, para. 36. Nugget is a corporation in which Georgette B. Andrews owns 75% of the voting stock, and her spouse, Jones P. Andrews, owns the remaining 25%. Ms. Andrews will serve full time as the station's general manager and Mr. Andrews will act as station manager. The Andrews have lived in the service area since 1987. *Id.* at paras. 9, 13. The ALJ excluded from credit the previous service area residence of Ms. Andrews from 1976 to 1982 and Mr. Andrews from 1980 to 1982 because Nugget did not establish until the hearing that the said residence was within the service area. *Id.* at para. 46. Nugget excepts to the ALJ's finding that its hearing testimony amounted to a comparative upgrade. We agree with Nugget that the ALJ may have been too harsh in his ruling. It appears from Nugget's February 19, 1991 integration statement and its hearing exhibits that it always sought credit for its principals' past residence in Gainesville, Georgia, although it was not until the hearing that it was clarified that Gainesville lies only partially within the 1 mV/m service area of the proposed station and that the Andrews lived within that portion falling within the service area. We do not believe this clarification amounts to an impermissible upgrade. *See Charisma Broadcasting Corp.*, 6 FCC Rcd 3411, 3412-13 (Rev. Bd. 1991)(applicant's failure to specify its hours-per-week integration commitment in its direct case held harmless technical error where integration statement contained the information and there was no variance at the hearing); *rev. denied*, FCC 92-563, released February 9, 1993 (Commission modifies past practice so that applicants describing full-time proposal in integration statement need not specify hours per week in direct written case). Nor do we believe that the excluded past residence makes much difference in any case since it is relatively remote in time and thus adds only slightly to Nugget's present area familiarity. *See Colonial Communications, Inc.*, 6 FCC Rcd 2296, 2297 (1991), *recon. dismissed*, 7 FCC Rcd 674 (1992); *AB Partners, Ltd.*, 7 FCC Rcd 5160, 5162 (Rev. Bd. 1992); *Ruth Payne Carmen*, 1 FCC Rcd 46 (Rev. Bd. 1986). Moreover, Croom's residence includes a year and a half in the community of license and another two years in an immediately adjacent community; whereas Nugget's is only in the broader service area, and even after factoring in the years of Nugget's residence excluded by the ALJ, Croom offers a history of continuous residence since 1982 whereas Nugget's principals returned to the service area only approximately two years before filing their application, and were absent from the area for a five year period from 1982 to 1987. *See Policy Statement*, 1 FCC Rcd 2d at 396) (Commission favors present residence of at least several years' duration); *Naguabo Broadcasting Co.*, 6 FCC Rcd 4879, 4880 (1991).

6. In assessing local residence backgrounds, we must also consider the applicants' records of previous civic activities to determine which has greater overall area familiarity and is more likely to respond to changing local needs. *Id.; Ronald Sorenson*, 6 FCC Rcd 1952 (1991), *recon. dismissed*, 6 FCC Rcd 6901 (1991). Croom has been active in the area since becoming a resident in 1982, having solicited blood donors for blood drives in Dahlonega from 1982 to 1985; volunteered to work with the Jaycees during the same years, and done promotion and traffic direction work in connection with its annual Gold Rush Festival; served as a volunteer fireman from 1984 to 1986, and obtained a state grant in 1986 for the purchase of fire equipment; and been an active member of the Jaycees since March 1989, although much of that activity occurred after he filed his application in July 1989. *Id.*, at paras. 37-38. Nugget's Ms. Andrews' civic activities go back only to 1987. She co-chaired the Chamber of Commerce advertising committee in 1988; was a member of the Jaycees in 1987 and 1988 and active in the Gold Rush Festival; was the public relations chairman for her college alumni association in 1987, and chapter adviser for a college sorority in 1988 and 1989; and has been a member since 1988 of the BSP Women's Organization. Her other activities post-date the filing of Nugget's application. Similarly, Mr. Andrews has been active since 1987 in the Chamber of Commerce, including service as a board member since 1988; the Rotary Club; and the Jaycees Gold Rush Festival, albeit a number of his activities also post-date the filing of Nugget's application. *Id.* at paras. 11, 14. Although Nugget excepts to the ALJ's ruling that its civic activities credit must be diminished somewhat because many of its principals' activities occurred subsequent to the filing of its application, *id.*at para. 47, this holding is consistent with precedent and reflects the Commission's general concern with comparative upgrading. *See Colonial Communications, Inc.*, 6 FCC Rcd at 2297; *Opportunity Broadcasting of Shreveport*, 7 FCC 3382, 3383 (Rev. Bd. 1992); *Frank Digesu, Sr.*, 7 FCC Rcd 837, 839 (Rev. Bd. 1992), *remanded on other grounds*, 7 FCC Rcd 5459 (1992). Thus, without allowing the analysis to be significantly altered by either applicant's post-filing activities, *see Beach Broadcasting Ltd. Partnership*, 6 FCC Rcd 4485 (1991), we find that both are enhanced by their community activities, but that Croom's activities are entitled to slightly greater weight. He has been active since arriving in Dahlonega in 1982, and the activities of the Andrews, which began only two years prior to the filing of

[1] Even were GMC entitled to full credit, as will be seen hereafter, Croom would nevertheless prevail as the superior comparative applicant.

their application, do not outweigh Croom's record of civic involvement during a substantial part of his local and area residence. When combined with his uninterrupted record of residence since 1982, Croom is preferred under this unified factor. *See Colonial Communications, Inc.*, 6 FCC Rcd at 2297.

7. This result is not altered by consideration of the minor factor of broadcast experience, *see Policy Statement*, 1 FCC 2d at 396, because both applicants have such experience including years in broadcast management positions. *I.D.*, paras. 10, 15, 39. Thus, no meaningful distinctions can be drawn in this regard, and, indeed, neither applicant excepts to the ALJ's award of equal slight enhancement credit for this factor. *Id.* at paras. 57, 58. The overall integration preference in this case therefore goes to Croom.[2] We now turn to the comparative coverage differences.

8. As of January 10, 1990, the deadline for amendments as of right in this proceeding, the applicants' overall coverage proposals were as follows:

	Area (sq. km)	Population (1980 census)
Croom	3,040	82,700
GMC	2,080	39,000
Nugget	2,100	53,500

Factoring in the service provided by Station WMEV, Cumming, Georgia, a full-time noncommercial educational station, the ALJ found that none of the applicants would provide coverage to under-served areas. *I.D.*, paras. 42-43. On June 11, 1990, Croom amended his application to reflect that he had relocated his transmitter site, which resulted in a reduction in the area and population served to 2,800 square kilometers and 82,100 people. Utilizing Croom's current site for the comparative coverage analysis, the ALJ found that Croom would serve 43,100 (110%) more people than GMC, and 28,600 (53%) more people than Nugget, resulting in a slight preference over GMC and a very slight preference over Nugget. Nugget, in turn, received a very slight preference over GMC because of a 37% overall advantage. *Id.* at paras. 53, 55. Nugget and GMC both except to the ALJ's reliance on Croom's current site proposal and argue that in order to avoid impermissible comparative upgrading, Croom should be held to the lesser coverage proposal in his original application filed in July 1989. If that proposal is credited, Croom would serve a 1,440 square kilometer area with a population of 28,600. In that case, Nugget would provide service to 24,900 (87%) more people and GMC would cover 10,400 (36%) more population than would Croom's original proposal. Joint Exh. 1, p.3. The Bureau supports the ALJ's resolution of the coverage issue.

9. All parties agree with the general proposition that an applicant may not improve its comparative posture after the time for filing amendments as of right has expired. This rule bars the obvious unfairness inherent in allowing one applicant to upgrade its proposal while the others are prevented from making such modifications after the cut-off date. *Alexander S. Klein, Jr.*, 86 FCC 2d 423, 434 (1981); *Mid-Florida Television Corp.*, 76 FCC 2d 158, 162-164 (1980); *Daytona Broadcasting Co.*, 97 FCC 2d 212, 216-217 (Rev. Bd. 1984) (subsequent history omitted). While it is clear that Croom's current proposal reduces, rather than improves, his cut-off date proposal, we disagree with the Bureau that the *Hearing Designation Order (HDO)* herein, 5 FCC Rcd 7248 (1990), by accepting Croom's June 11, 1990, amendment, resolves the matter and mandates rejection of the argument that Croom must be held to the coverage from his original site. The *HDO* merely stated that because the amendment was accompanied by a good cause showing, it was accepted for filing, but that any comparative advantage would be disallowed, thus providing no "reasoned analysis" of the disputed question before us, *i.e.*, specifically which coverage proposal should Croom be held to. *See Revised Procedures for Processing of Contested Broadcast Applications*, 72 FCC 2d 202, 216-217 (1979); *Atlantic Broadcasting Co.*, 5 FCC 2d 717 (1966); *Western Cities Broadcasting, Inc.*, 6 FCC Rcd 2325 (Rev. Bd. 1991).

10. The factual circumstances not discussed in the *HDO* are as follows. On January 8, 1990, two days before the last date for filing amendments as of right, Croom filed his amendment specifying a new site based on verbal assurance of the site's availability provided January 5 by the property owner, Milton Howard. Also on January 8, but apparently after the amendment was filed, Howard informed Croom that, in the applicant's words, "certain restrictive covenants affecting the property may or may not render the property suitable for the applicant's purposes." On January 9, Croom so informed the Commission in an amendment wherein he also stated: "Consequently, the applicant may ultimately conclude that his revised transmitter site ... is unsuitable for the erection of a broadcast tower." No further action was taken by Croom before the cut-off date, but approximately one month thereafter, on February 12, 1990, Croom filed another amendment stating that he had now "concluded that [the] restrictive covenants affecting the property would, in all likelihood, render the property unsuitable for the applicant's purposes," and that, therefore, he had proceeded to locate another transmitter site. The amendment proposing this site was filed June 11, 1990. Nugget Exhs. 19-23. Thus, it appears that Croom, who amended to a site with superior coverage almost on the eve of the cut-off date, was on notice from the site owner the very day the amendment was filed that a serious question existed as to whether the site in question would ever be viable, and was aware that the site might "ultimately" prove unsuitable. It was not until after the cut-off date, however, that Croom satisfied himself that his fears were well-founded and that a new site was needed. Croom does not explain why, given the information he had on January 8th, he did not establish the facts before the comparative case was frozen,[3] and this goes to the heart of the question of what result would be least prejudicial to the parties here.

11. In this regard, *Women's Broadcasting Coalition, Inc.*, 59 RR 2d 730 (1986), *aff'd sub nom. Plantation Broadcasting Corp v. FCC*, 812 F.2d 1443 (D.C. Cir. 1987), is instructive. There, adverting to the general rule that an applicant is not permitted to claim credit beyond that

[2] Even if GMC was entitled to full quantitative credit, its combined residence/civic activities credit is significantly inferior to Croom because its principals, although long-term area residents like Croom, have minimal civic activities beginning only in 1987, two years prior to their application filing, and mostly post-dating the application filing. *See* GMC Exhs. 2, 3. They offer broadcast experience, as does Croom, and thus the overall integration preference is in Croom's favor.

[3] The covenants in question clearly state that the property may only be used for residential purposes. Nugget Exh. 23.

proposed by the cut-off date and overruling a previous precedent insofar as it implied that comparative upgrading is permissible in transmitter site relocation cases, the Commission allowed credit to an applicant for the amount of coverage originally proposed and which it originally had reasonable assurance of attaining before the FAA unexpectedly withdrew approval of its proposal. *Id.* at 733. Here, in view of the circumstances described, however, we do not believe Croom ever obtained reasonable assurance of the suitability of his January 8th site, and that it would therefore be prejudicial to the other parties to allow him to claim coverage from his latest site, because that proposal, made after the cut-off date, is a significant improvement over his original application proposal, which is the only pre-cut-off date proposal whose feasibility is not in question. Thus, as was similarly the case in *Seattle Public Schools*, 4 FCC Rcd 625, 644 (Rev. Bd. 1989), where, although the site's availability was not in doubt, a coverage preference was disallowed because a government moratorium existed on issuance of use permits on the specified site, and the applicant's proposal did not meet radiation standards in place on the site, we will not permit Croom to claim a coverage preferences for a proposed site which he knew before the cut-off date was likely to be restricted.

12. Accordingly, Nugget will receive a coverage performance over Croom (as well as GMC), which is at most slight, because all areas are well-served with five or more signals, and the Commission, whether expressing the differential in terms of percentages (*Beach Broadcasting Limited Partnership*, 6 FCC Rcd at 4485 (1991)), or raw numbers (*Barton Broadcasting Co.*, 104 FCC 2d 785, 790-791 (Rev. Bd. 1986), *recon. denied*, FCC 86R-58, released September 18, 1986), traditionally awards only modest preferences for overall coverage where the entire service area is already well-served. Croom, on the other hand, also receives a slight preference for integration, which the Commission considers to be a factor of substantial importance, *Policy Statement*, 1 FCC 2d at 395, and specifically for his local residence/civic participation background, which is a fundamental licensing consideration because it reflects continuing knowledge of the community's changing needs and interests. *Radio Jonesboro, Inc.*, 100 FCC 2d 941, 945 (1985). In sum, while each applicant has a single preference, Croom is preferred because the Commission has traditionally held that a slight integration preference, even when based solely on qualititative factors, is intrinsically superior to a slight coverage preference. *See William J. Carroll*, FCC 93-55, released February 5, 1993; *Naguabo Broadcasting Co.*, 7 FCC Rcd 1696, 1697 (1992); *Jarad Broadcasting Co., Inc.*, 1 FCC Rcd 181, 190 (Rev. Bd. 1986)(subsequent history omitted).[4]

13. ACCORDINGLY, IT IS ORDERED, That the application of Kevin C. Croom (File No. BPH-890728MG) for a construction permit for a new FM station at Dahlonega, Georgia IS GRANTED, and the applications of Nugget Broadcasting Company (File No. BPH-890728MD) and Georgia Mountain Communications, Inc. (File No. BPH-890728ME) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board

[4] For the same reason, even if we gave GMC full integration credit, we would reject its contention that Croom's superior integration proposal is overcome by GMC's claimed slight preference for providing a fifth night-time aural service to approximately 1300 more people than Croom. The ALJ ignored this argument because of his finding that station WMEV eliminated the provision of fifth services in this case is any event, and we agree with the ALJ's conclusion. Because of the result reached herein, we need not reach GMC's argument that a financial qualifications issue should have been specified against Nugget. "An agency, like a court, need not decide questions which are not relevant to its decision." *Deep South Broadcasting Co. v. FCC*, 278 F.2d 264, 266 (D.C. Cir. 1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Request for a Declaratory Ruling
concerning arrangements between
applicants for the Interactive
Video and Data Service

MEMORANDUM, OPINION AND ORDER

Adopted: February 24, 1993; Released: March 4, 1993

By the Chief, Private Radio Bureau:

1. The Private Radio has before it a request for a declaratory ruling filed by Mr. Marcos Rodriguez, Jr. (Rodriguez motion) on January 29, 1993. Mr. Rodriguez seeks a declaration approving his proposed formation of a business organization by and between applicants to operate an Interactive Video and Data Service (IVDS) system in the Dallas, Texas, market. IVDS is personal radio service in which licensees may provide a variety of radio-based interactive services to the public.[1]

2. Mr. Rodriguez is an applicant for an IVDS system license in, among other areas, the Dallas, Texas, market. Mr. Rodriguez's proposal entails the following: certain parties that have individually applied for an IVDS system license in the Dallas, Texas, market would enter in an agreement which binds them to form a new legal entity if one of the parties to the contract is made a tentative selectee by an IVDS lottery.[2] Under the agreement, the party to the contract that is selected by an IVDS lottery would retain control of the license while the other parties would acquire an ownership interest therein on a pro rata basis.[3] Further, the Rodriguez motion states that the agreement would not permit any party to hold an interest in more than one IVDS system license in the same market.[4] Mr. Rodriguez queries whether his proposed agreement is permissible under the established IVDS rules and policies.

3. It is not the policy or past practice of the Private Radio Bureau to issue declaratory rulings on the acceptability of particular private management contracts. Nevertheless, because of the potential negative impact that confusion in this area could have on implementation of IVDS, we will address this issue.

4. At issue here is whether it is permissible for the IVDS applicants to enter into a contract or agreement whereby if one of the parties to the agreement becomes a tentative selectee, the other parties to the agreement would acquire an ownership interest in the IVDS license.[5] In developing rules and policies for IVDS we were guided by our experience in other radio services where licenses generally are decided by lottery.[6] Our experience in these cases has been that (1) there is a growing problem with the filing of speculative applications,[7] (2) agreements such as the one proposed Mr. Rodriguez makes filing applications more attractive to those who wish only to speculate and (3) the usefulness of settlement agreements in situations where there is a high volume of applications is far outweighed by the problems they cause.

5. In the *Report and Order*[8] (R&O) establishing IVDS the Commission noted the importance of minimizing speculative applications and adopted criteria to achieve this end. Three of the criteria apply here. First, the Commission stated in the text of the R&O that "[a]n [IVDS] applicant may not have any interest in another pending application for the same service area."[9] Second, it adopted a rule that a licensee may have no ownership interest in, financial interest in, or exercise *de facto* control over, both frequency segments in the same service area.[10] Third, it adopted a rule prohibiting the transfer of an IVDS license until the system construction benchmarks were met.[11] Mr. Rodriguez's agreement is clearly at variance with the policy articulated in the R&O against applicants having an interest in another pending application in the same IVDS service area. Further, despite the claim of the Rodriguez motion, the agreement has the potential to violate the rule against any party holdingan interest in more than one IVDS frequency segment in the same area.[12] Finally, under Mr. Rodriguez's proposal, a new legal entity would be created.[13] This would appear to violate the intent of the rule prohibiting license transfer before construction benchmarks are met.

6. Accordingly, the Bureau concludes that Mr. Rodriguez's proposal as described herein for the IVDS service is not permitted. This position is consistent with the Commission's approach to other private radio services[14]

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[1] *See Report and Order*, 7 FCC Rcd 1630 (1992).

[2] *See* Rodriguez motion at 1-3.

[3] *Id.* The Rodriguez motion describes the entity as a partnership with the tentative selectee serving as the general partner with majority control of the voting stock, and the other associated applicants serving as limited partners.

[4] *Id.*

[5] These agreements, often called "partnerships", "partial settlements", or "alliance agreements", provide each party an interest in the applications of all the parties to the agreement.

[6] *See e.g.*, the private land mobile 220 MHz service, 47 C.F.R. Part 90.

[7] Basically, speculative applications are applications filed by entities that have no real interest in developing and operating communications systems. Such applications slow processing and delay initiation of service to the public. *See Report and Order*, PR Docket 89-552, 6 FCC Rcd 2356 (1991), *Memorandum, Opinion and Order*, PR Docket 89-552, 7 FCC Rcd 4484 (1992), *Third Report and Order*, PR Docket 85-388, 4 FCC Rcd 2440 (1988), *Notice of Proposed Rule Making*, PR Docket 92-80, 7 FCC Rcd 3266 (1992).

[8] 7 FCC Rcd 1630 (1992).

[9] *Id.* at 1639.

[10] *Id.* at 1640.

[11] *Id.* at 1640.

[12] If two parties to the contract have their applications selected by the IVDS lottery to serve the Dallas, Texas, market, then the contract would apparently create two IVDS licensees in the same market with a shared financial interest in a manner contrary to the IVDS rules and policies.

[13] *See* Rodriguez motion at 2.

[14] For example, such agreements are a violation of Section 90.713(d), 47 C.F.R. § 90.713(d), which states that 220 MHz applicants may not have any interest in another pending application in the same geographic area for frequencies in the same category.

and the Multipoint Distribution Service (MDS), a point-to-multipoint service, where there has been an emphasis on reducing speculative applications. Therefore, the request for a declaratory ruling filed by Mr. Marcos Rodriguez, Jr. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Originator: Marc Martin
Aviation and Marine Branch, 632-7175

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 24, 1993

COMMON CARRIER BUREAU ESTABLISHES PLEADING CYCLE FOR ZONE DENSITY PRICING PLANS

Comments Due: March 15, 1993
Reply Comments Due: March 29, 1993

On February 16, 1993, 12 Tier 1 Local Exchange Carriers filed zone density pricing plans pursuant to the Commission's *Expanded Interconnection Order*.[1] The following companies filed plans: Ameritech Operating Companies, Bell Atlantic, BellSouth Telecommunications, Inc., Centel Corporation, Lincoln Telephone, NYNEX Telephone Companies, Southwestern Bell Telephone Company, Pacific Bell, Rochester Telephone Corporation, Southern New England Telephone Company, US West Communications, and United Telephone Companies. At the same time, LECs filed expanded interconnection tariffs pursuant to the *Expanded Interconnection Order* to be effective on 90 days' notice. This public notice establishes a schedule for the filing of comments and reply comments concerning the LECs' zone density pricing plans.

All comments concerning a LEC's zone density pricing plan must be headed "Comments of [commenter's name]." The caption of all pleadings concerning a LEC's zone density pricing plan must read:

In the Matter of
XYZ Telephone Co.
Zone Density Pricing Plan

The due dates for the pleadings concerning the zone density pricing plans that were filed on February 16 are identical to the filing dates for petitions and replies concerning the expanded interconnection tariffs. We remind commenters, however, that pleadings concerning the LECs' zone density pricing plans must be filed separately from pleadings concerning the LECs' expanded interconnection tariffs. In addition, pleadings concerning the zone density pricing plans must include the caption of all zone density pricing plans that they address.

Petitions must be filed no later than **March 15, 1993.** Replies must be filed no later than **March 29, 1993.** An original and four copies of all comments and replies must be filed with the Secretary of the Commission in accordance with Section 1.51(c) of the Commission's Rules. Parties must also furnish one copy of their comments and replies to ITS, Inc., the Commission's duplicating contractor, at its office in Room 246, 1919 M Street, N.W., Washington D.C. 20554, and four copies to the Chief, Tariff Division, Room 518, 1919 M. Street, N.W., Washington, D.C. 20554.

For further information contact Kelly Cameron or Debra Sabourin, Common Carrier Bureau, Tariff Division at (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

[1] Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, and Amendment of the Part 69 Allocation of General Support Facility Costs, CC Docket No. 92-222, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369 (1992)(*Expanded Interconnection Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 23, 1993

PLEADING CYCLE ESTABLISHED FOR AT&T PETITION TO MODIFY PART 61 OF THE COMMISSION'S RULES

CC Docket No. 90-132

On February 17, 1993, AT&T filed a petition to amend Part 61 of the Commission's Rules to substitute further streamlined regulation for price cap regulation of AT&T's Basket 2 services as of May 1, 1993, the date number portability for 800 services will become available. AT&T states that the Commission has previously concluded that this change should be made when 800 number portability is generally available.

Interested parties should file comments on this petition by **March 10, 1993**, and reply comments by **March 22, 1993**. Comments should be filed with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. Copies should also be sent to Gary Phillips and Andre Lachance, Policy Division, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W. Washington, D.C. 20554, as well as to the Commission's contractor for public service records duplication, International Transcription Services, 2100 M Street, N.W., Suite 140, Washington, D.C. 20037.

We will treat this proceeding as nonrestricted for purposes of the Commission's *ex parte* rules. *See generally* 47 C.F.R. §§ 1.1200-1.1216. For further information, contact Andre Lachance or Gary Phillips, Policy and Program Planning Division, Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 23, 1993

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON EMERGENCY PETITION OF ALLNET COMMUNICATION SERVICES, INC. FOR DECLARATORY RULING OR, IN THE ALTERNATIVE, RULEMAKING

On February 17, 1993, Allnet Communication Services, Inc. (Allnet) filed an emergency petition for declaratory ruling or, in the alternative, rulemaking concerning 800 presubscription rules for 800 service providers and Responsible Organizations (RESPORGs).

Allnet asserts that rules analogous to the Commission's presubscription rules for 1+ services are needed for 800 services, and that such rules should be adopted before the May 1, 1993 implementation of 800 number portability. Allnet therefore proposes that the Commission adopt 800 service presubscription rules governing the conduct of RESPORGs and 800 service providers. The rules proposed by Allnet would require, first, that an 800 subscriber's existing 800 carrier or RESPORG must implement any carrier or RESPORG changes requested by the subscriber within two business days. Second, Allnet's proposed rules would specify that an 800 subscriber may initiate all such changes for its own 800 service, even if the subscriber purchases 800 service through a reseller. Third, Allnet's proposed rules would allow a subscriber to complete one standard form, submitted to either its current or new 800 service provider or RESPORG, in order to implement carrier or RESPORG changes.

Interested parties are to file comments on this petition by **March 16, 1993**, and reply comments by **March 26, 1993**, with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Suzanne M. Tetreault, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's copy contractor, International Transcription Service, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037.

For further information, contact Suzanne M. Tetreault, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-6374.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-10

In the Matter of

Provision of Access
for 800 Service

ORDER

Adopted: February 10, 1993; Released: February 10, 1993

By the Commission:

I. INTRODUCTION

1. On June 19, 1992, the Competitive Telecommunications Association (CompTel) filed a petition for declaratory ruling on three issues relating to 800 data base service. We now rule that: (1) "area-of-service routing," which is the routing of 800 calls by local exchange carriers (LECs) to different interexchange carriers (IXCs) based on the local access transport area (LATA) in which the call originates, is a part of basic 800 access, rather than an optional vertical feature; (2) access to the Service Management System (SMS) by Responsible Organizations (RESPORGs) is a Title II common carrier service and shall be provided pursuant to tariff; and (3) any entity that meets appropriate financial and technical eligibility requirements may serve as RESPORG for an 800 number record at the customer's request.

II. BACKGROUND

2. 800 service is an interexchange service in which a subscriber agrees in advance to pay for all calls made to its 800 number from a specified area. LECs must handle originating 800 access differently from originating access for ordinary interexchange calls because the LECs must route 800 calls to the carrier selected by the 800 service subscriber (the called party), rather than the carrier presubscribed to the originating line or chosen by the calling party.

3. LECs currently provide originating 800 access through the so-called "NXX" screening methodology. Under this system, LECs identify the IXC by reading the three digits (the NXX digits) that immediately follow the 800 prefix of the called number. Consequently, the NXX system does not permit 800 number portability -- that is, 800 service subscribers cannot switch carriers without changing their 800 numbers.

4. The Bell Operating Companies (BOCs), along with the Independent Telephone Companies (ITCs), will soon replace the NXX access system with a new "data base" system of 800 access. LECs will implement this data base system by linking their common channel signaling, or SS7, networks with data bases containing service information associated with each 800 number, including the carrier selected by the 800 subscriber for that number. Because the data base system permits LECs to use the entire 800 number, rather than just the NXX digits, to identify the 800 carrier, this system allows 800 number portability.

5. In addition to basic carrier identification functions, the 800 data base system will have the capability to perform more complex, "vertical" routing features or functions. These include: (1) call validation, which ensures that calls originate from subscribed service areas; (2) translation of 800 numbers into "plain old telephone service" (POTS) numbers; (3) alternate POTS translation, which allows subscribers to vary the destination of 800 calls based on factors such as time of day, or place of origination of the call; and (4) multiple carrier routing, which allows subscribers to use different carriers based on similar types of factors.[1] The Commission has held that vertical features may be provided by LECs only to: (1) their own intraLATA 800 subscribers for use with an intraLATA 800 service; and (2) purchasers of basic 800 access. LECs may not provide vertical features directly to IXCs' 800 services subscribers.[2] The Commission has also held that unless the cost of providing a particular vertical feature is inconsequential, LECs should unbundle that feature from basic 800 access service.[3]

III. DISCUSSION

A. Area of Service Routing

1. CompTel Petition

6. CompTel asks for a declaratory ruling that area-of-service routing is a part of basic 800 access service rather than a vertical feature. CompTel asserts that most IXCs rely on transport facilities from other carriers to originate a portion of their 800 traffic. CompTel maintains that if the area-of-service routing necessary to accomplish this is considered a separately chargeable vertical feature, these IXCs will be forced to pay higher 800 access rates than national carriers and will thereby be placed at a competitive disadvantage.[4] Noting that carriers use area-of-service routing arrangements today under the NXX access system without incurring extra charges, CompTel argues that it would be ironic and unfortunate if the data base system, intended to equalize competition, instead created cost disparities among 800 service carriers.[5] CompTel argues that area-of-service

[1] *See* Provision of Access for 800 Service, Memorandum Opinion and Order on Reconsideration and Second Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 5421 (1991)(*Reconsideration Order*), at para. 5.

[2] *Id.* at paras. 34-36.

[3] *Id.* at paras. 47-51.

[4] CompTel Petition for Expedited Declaratory Ruling, filed June 19, 1992, at 4-8.

[5] *Id.* at 5. Under the NXX system today, a regional carrier that lacks originating capability from particular end offices can assign its NXX to another carrier at those end offices. Since LECs load NXX code assignments on an end-office-by-end-office basis, no special charges are assessed when this occurs.

routing must be treated as a basic service in order to permit full competition in the nationwide 800 service market.[6]

7. CompTel argues, further, that area-of-service routing is functionally distinct from vertical features. CompTel states that every query that is launched to the data base will indicate the LATA in which the call originates, and that, consequently, a LEC may offer area-of-service routing based solely on information contained within the data base query. In contrast, it states, multiple carrier routing and other vertical features require the data base to check information extraneous to the query, such as the time or date of the call or some other factor, in order to determine the correct routing of the call.[7]

2. Positions of the Parties

8. Large users and IXCs other than AT&T and Allnet support CompTel's petition.[8] Ad Hoc, for instance, asserts that treating area-of-service routing as a vertical feature will significantly reduce the value to its members of number portability.[9] Ad Hoc states that to minimize risk, its members generally will not switch carriers for important 800 numbers on a flash-cut basis, but will only transfer traffic on such numbers gradually. It states that if users are forced to pay extra charges any time they use more than one IXC, they will be deterred altogether from switching carriers. Ad Hoc also asserts that if area-of-service routing is treated as an optional, vertical feature, AT&T will not offer this service to its customers.[10]

9. Some users argue that the Commission should treat area-of-service routing as part of basic access service to encourage the use of multiple IXCs, which they say will maximize competition.[11] They argue that when a subscriber uses more than one IXC, the forces of competition are maximized, since each IXC feels more vulnerable to a loss of business. In addition, users argue that use of multiple IXCs minimizes the risk to users from network outages.[12]

10. MCI and Sprint also assert that treating area-of-service routing as a basic element of 800 access will facilitate the participation of smaller and regional carriers in 800 services.[13] Sprint asserts that even if area-of-service routing were technically a vertical feature, it should be treated as a basic element of 800 access for public policy reasons.[14] Sprint also expresses concern that if area-of-service routing is classified as a vertical feature, some LECs may decline to offer it.[15] In addition, Sprint suggests that the costs of unbundling area-of-service routing may exceed the costs of providing that feature.[16]

11. AT&T and Allnet oppose CompTel's petition.[17] AT&T argues that area-of-service routing is just a form of multiple carrier routing, which, it says, the Commission has already identified as a vertical feature. AT&T asserts that basic 800 access service consists solely of the ten-digit screening that allows routing of 800 calls to a single designated carrier.[18] AT&T says that the Commission has defined a basic feature as something that is a "virtual prerequisite" to the provision of 800 service.[19] AT&T argues that area-of-service routing is a vertical feature because 800 service can be provided without it.[20] AT&T also argues that treating area-of-service routing as a part of basic service would subvert the Commission's unbundling objectives and the underlying principle that costs should be borne by the cost causer.[21] In response to Ad Hoc's argument that AT&T may not offer area-of-service routing if it is treated as a vertical feature, AT&T argues that competitive forces will ensure that IXCs meet users' needs. AT&T does not, however, expressly commit to offering area-of-service routing to its customers.[22] Allnet argues that area-of-service routing should be classified as a vertical service, asserting that the cost of providing 800 data base service with area-of-service routing capability is clearly higher than the cost of providing a service without that capability.[23]

12. LECs state that, under the data base system, area-of-service routing is functionally the same as basic access.[24] They state that whenever a query is launched to the data base, that query contains the originating LATA for the call, so that a distinction can be made in the event the subscriber uses a LEC for intraLATA 800 service and an IXC for interLATA service. The basic query is made on a LATA-by-LATA basis -- that is, the query seeks the carrier serving the 800 number in the originating LATA. For that reason, LECs state, it does not matter whether there are different carriers serving different LATAs: a LATA-based query is made in any event.

13. LECs state that with multiple carrier routing, by contrast, they must query a separate field within the data base for carrier identification information because the query must be made using more than the originating LATA information.[25] In addition, they state, with most multiple carrier routing services, including varying the carrier by day, time of day, or based on some traffic distribution

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[6] *Id.* at 5.
[7] *Id.* at 7.
[8] Ad Hoc Comments at 3-9; ARINC Comments at 3-4; Cable & Wireless Comments at 2-3; First Financial Reply at 6-7; ICA Comments at 3-4; LDDS Comments at 3-4; LinkUSA Comments at 2-3; MCI Comments at 4-6; Metromedia Comments at 1-2; Sprint Comments at 6-8; USLink Comments at 1; WilTel Comments at 2-4.
[9] Ad Hoc Comments at 3; Ad Hoc Reply at 2.
[10] Ad Hoc Comments at 4-5. Since LECs cannot offer vertical features for interLATA services directly to IXCs' 800 service customers, customers may purchase vertical features only through their IXCs.
[11] Ad Hoc Comments at 5-6; First Financial Reply at 7.
[12] Ad Hoc Comments at 6.
[13] MCI Comments at 4-5; Sprint Comments at 6.
[14] Sprint Comments at 6.
[15] *Id.* at 6-7. *See also* First Financial Reply at 7.
[16] Sprint Comments at 7-8.
[17] AT&T Comments at 3; Allnet Comments at 6-7.
[18] AT&T Comments at 3.
[19] *Id.* at 4.
[20] *Id.* at 4.
[21] *Id.* at 5.
[22] *Id.* at 3-4.
[23] Allnet Comments at 6-7.
[24] *See* letter from Anthony M. Alessi, Director-Federal Relations, Ameritech, to Donna Searcy, Secretary, FCC, January 19, 1993; letter from William A. Blase, Jr., Director, Federal Regulatory, SWBT, to Donna Searcy, Secretary, FCC, January 27, 1993; *see also* SWBT Comments at 2.
[25] For instance, one would have to make a query based on the NXX of the originating caller to designate different carriers by originating end office.

formula, the data base query does not itself contain the information necessary for the carrier identification function. Instead, the data base must check additional information, not part of the query, in order to perform the carrier identification. LECs state, therefore, that area-of-service routing is factually different from multiple carrier routing. SWBT notes that this functionality is available today under NXX access with no separate charge, and asserts that it would be inappropriate to establish a separate charge under mandatory number portability for something that was non-chargeable under NXX access.[26]

3. Discussion

14. We find that area-of-service routing is a basic feature of 800 access. Treating area-of-service routing as a basic feature of 800 access will offer a number of public policy benefits. First, it will maximize competition in 800 services. Many small IXCs must use area-of-service routing in order to offer a nationwide 800 service. These IXCs are able to enter into partnering arrangements with other IXCs today without paying additional access charges. Treating area-of-service routing as a basic feature of 800 access will enable them to continue doing so. Moreover, IXCs that cannot obtain all of the 800 business of a particular customer will be able to compete for a portion of that business without having to pay an additional charge. Thus, we believe, treating area-of-service routing as a basic feature will make the 800 services marketplace more open and competitive.

15. Second, treating area-of-service routing as a basic feature will make it easier for users to take full advantage of number portability. Some users have stated that they will use area-of-service routing to reduce the risk of a service change by gradually shifting traffic from one carrier to another. They state that if the cost of area-of-service routing is too high, they may be deterred from making any changes at all. Treating area-of-service routing as a basic feature will enable users to take full advantage of this capability so that they may transition from one carrier to another in the most efficient way possible. In addition, it will facilitate the use of multiple carriers so that in the long-term, users will be able to obtain an efficient 800 service arrangement.

16. We also believe that, from a technical standpoint, area-of-service routing is properly viewed as a basic feature of 800 access. As LECs note, every data base query contains the originating LATA of the call, and the response indicates the appropriate carrier based on the originating LATA. While the system was designed in this way so as to permit interLATA/intraLATA distinctions, distinctions among interLATA calls can also be made without querying separate data fields within the data base. Area-of-service routing can thus be provided as part of the basic data base query. In contrast, multiple carrier routing requires that separate fields within the data base be established and queried for each 800 call.

17. This decision is not, as AT&T asserts, inconsistent with our longstanding policy of linking costs to the cost-causer. Because data base queries must be LATA-specific in any event, the incremental costs of providing area-of-service routing are nominal. Moreover, since IXCs do not currently pay extra charges for dividing traffic on a LATA-by-LATA basis, it seems reasonable for the LECs to have designed the data base system to allow such arrangements to continue as a part of the basic 800 data base service. Therefore, we conclude that area-of-service routing is a part of basic 800 access.

18. The Commission has not, as AT&T claims, already found area-of-service routing to be a vertical feature. The Commission has never specifically addressed this issue. Moreover, AT&T's assertion that the Commission has defined basic features of 800 access as those features that are a "virtual prerequisite" to the provision of 800 service mischaracterizes the Commission's 1989 Report and Order. The discussion in that order cited by AT&T did not address whether features are basic or vertical, but, rather, whether LECs should be permitted to offer vertical features as a part of 800 access, and if so, to whom. In concluding that LECs should be permitted to offer POTS translation service to IXCs, the Commission noted that POTS translation is a virtual necessity for IXCs wishing to enter the 800 market. Indeed, the Commission's conclusion that POTS translation, a vertical feature, is a "virtual prerequisite" to the provision of 800 service is inconsistent with AT&T's claim that the Commission has defined *basic* services as those that are virtual prerequisites to providing 800 service.[27]

B. SMS Access

19. The SMS is the centralized data base system that provides a national coordinated system for the assignment of 800 numbers, the entry of 800 customer records, and the loading of customer records into regional data bases (SCPs) owned and operated by the LECs. The SMS is administered by the 800 Number Administration and Service Center (NASC), which Bellcore has administered since 1989.[28] In response to concerns about Bellcore's role as NASC administrator, however, the BOCs and Bellcore have agreed to transfer responsibility for the day-to-day operations of the NASC from Bellcore to a neutral third party. For each 800 number, only one entity, the RESPORG, will have authority to access the SMS in order to input or change service information with respect to that number. The BOCs and Bellcore currently plan to charge the RESPORG for this access to the SMS. The BOCs have proposed that these charges be based on a contractual relationship between the SMS administrator and each RESPORG.

1. CompTel Petition

20. CompTel asks the Commission to require that SMS access be tariffed.[29] CompTel states that the SMS administrator is a monopoly service provider and that access to the SMS is necessary to the provision of 800 service. CompTel also asserts that the contract proposed by Bellcore for SMS access contains numerous onerous provisions.

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[26] SWBT Comments at 1-3.

[27] Provision of Access for 800 Service, Report and Order, 4 FCC Rcd 2824, 2830 (1989).

[28] *See* letter from Marie Breslin, Director, FCC Relations, Bell Atlantic, to Donna Searcy, Secretary, FCC, May 22, 1992. The industry uses the terms NASC administrator and SMS administrator interchangeably to refer to the same entity. Technically, the SMS is the data base system itself; the NASC is the operations center that administers the SMS on a day-to-day basis.

[29] CompTel Petition at 11-13.

2. Positions of the Parties

21. Virtually all commenters other than the BOCs and AT&T support CompTel's request.[30] These parties echo the reasons cited by CompTel, arguing generally that the tariffing of SMS access is the only way the Commission can ensure that this essential service is provided on just, reasonable, and nondiscriminatory terms to all 800 service providers.

22. AT&T, however, takes the position that SMS access should be offered under contract, asserting that the contract process is more responsive to customer needs, will hold costs down, and will facilitate transfer of control of the SMS to a third party. AT&T says that the Commission's oversight responsibility will be sufficient to guard against discriminatory treatment and unreasonable charges.[31]

23. BOCs assert that the SMS administrator provides "administrative functions," not common carrier services.[32] They state that Bellcore would offer the same contract to every RESPORG and would be willing to file that contract with the FCC.[33] They also offer to establish a board of directors composed of a cross-section of industry representatives to oversee the NASC.[34] BOCs also argue that it may be impractical to file tariffs in time to meet the data base implementation deadline.[35]

24. The BOC proposal to establish an industry-based board of directors with authority over the SMS administrator does not satisfy some IXCs.[36] They express concern that some IXCs would not be adequately represented on such a board and that unless SMS access were treated as a Title II service, the Commission would be unable to address discrimination or other problems that might arise in the administration of the SMS. Some parties also argue that an industry board, composed of selected industry members, with authority to establish SMS policies and/or prices, would violate federal antitrust laws.

3. Discussion

25. We find that, under the current BOC plans for providing SMS access, SMS access is a Title II common carrier service that should be offered pursuant to tariff. We conclude further, based on how SMS access will be provided, that the BOCs should file the necessary tariff.

26. The determination of the jurisdictional status of SMS access hinges upon two questions: (1) is SMS access an interstate or foreign communications service under section 3(a) of the Communications Act, which defines communications services to include not only the transmission of signals by wire or radio, but also all services incidental to such transmission; and (2) if so, is it a common carrier service, under section 3(h) of the Act?

27. With regard to the first question, in view of the broad language of section 3(a), we think it is reasonable to find that access to the SMS falls under that provision. Specifically, we find that SMS access is incidental to the provision of 800 access services. The data input into the SMS derive from the provision of 800 access service. More significantly, SMS access is absolutely necessary to the provision of 800 service using the data base access system. IXCs do not have the option of providing 800 service information directly to each individual LEC or to each LEC with its own data base; the information can only be loaded through the SMS. Thus, SMS access is technically necessary to the provision of 800 access service, and is incidental to the provision of such access.[37]

28. With regard to the second question, we find that the better course at present is to treat SMS access as a common carrier service under section 3(h) of the Act. If an entity is placed under a legal compulsion to hold itself out indiscriminately to the clientele it is suited to serve, it is a common carrier under *NARUC I*.[38] Some parties argue that SMS access need not be treated as a common carrier service and tariffed under Title II because Bellcore will transfer administration of the SMS to a neutral third party in order to safeguard against discrimination by the SMS administrator. In addition, the BOCs argue that they have proposed to establish a board of directors composed of a cross-section of industry representatives to oversee the NASC.[39] Thus, customers may be able to represent themselves adequately in dealings with the SMS service provider without requiring that SMS access be provided as a common carrier service.

29. On balance, however, we find that the better course for now is to require that SMS access be tariffed as a Title II service. We reach this conclusion in light of the importance of ensuring that SMS access is provided at reasonable rates and on nondiscriminatory terms, and because of the untried nature of the proposed alternative mechanisms for achieving these goals. While transferring administration of the SMS to a neutral third party may reduce incentives for discrimination in the day-to-day operation of the SMS, it is not clear at this point that this transfer will sufficiently reduce our concerns about possible discrimination in the provision of this monopoly service.[40] Nor does the proposal for an industry board of directors sufficiently address our concerns in this area. We note that the industry has not yet agreed on the makeup of any such board or on the powers that it would be granted. Moreover, some IXCs have expressed concern that their interests would not be well represented by an industry board and that there may be federal antitrust problems in establishing an industry board with authority to affect prices or policies. Because SMS

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[30] Ad Hoc Comments at 12-13; Allnet Comments at 8; ARINC Comments at 4-5; Cable & Wireless Comments at 4-6; ICA Comments at 5; ITN Comments at 5-6; LDDS Comments at 4; LinkUSA Comments at 2; MCI Comments at 3-4; Metromedia Comments at 2-3; Sprint Comments at 1-6; USLink Comments at 1; WilTel Comments at 5-6.

[31] *Ex parte* letter from Karen Weis, Division Manager, Federal Regulatory Affairs, AT&T to Donna Searcy, Secretary, FCC, December 29, 1992.

[32] Bell Companies Comments at 4-5; USTA Comments at 3-4.

[33] Bell Companies Comments at 7.

[34] *Id.* at 8. *See also* letter from Marie Breslin, Director, FCC Relations, Bell Atlantic, to Donna Searcy, Secretary, FCC, March 13, 1992.

[35] Bell Companies Comments at 4; SWBT Comments at 5.

[36] *See, e.g.*, Sprint Reply at 4-5; MCI Reply at 6.

[37] *See* Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, Report and Order and Request for Supplemental Comment, 7 FCC 3528 (1992) (Calling Card Validation Order).

[38] NARUC v. FCC, 525 F.2d 630 (D.C. Cir. 1976), *cert. denied*, 425 U.S. 999.

[39] Bell Companies Comments at 8; GTE Comments at 3.

[40] *See* Expanded Interconnection with Local Telephone Company Facilities, 7 FCC Rcd 7369 at 7443-47 (1992); Calling Card Validation Order, *supra*, 7 FCC Rcd at 3532.

access is necessary to the provision of 800 service under the data base system, it is essential that SMS access be provided on a nondiscriminatory basis and at reasonable rates. At this time, we believe that the service must be tariffed to ensure both these goals are met.

30. Having determined that SMS access should be tariffed, we now turn to the question of who should file those tariffs. As described above, the centralized SMS is the means by which SCP data base owners obtain the data necessary for them to provide 800 access service under the data base system. The BOCs, through Bellcore, have designed and developed the SMS for the use of the industry and will provide the SMS software, software maintenance and enhancement services, and billing and collection services. Southwestern Bell has provided the computer that will run the SMS software and the facilities in which the SMS will be housed. Bellcore, as the NASC, will initially administer the SMS on a day-to-day basis. Subsequently, however, the BOCs will subcontract NASC responsibilities to an independent third party because of the industry's desire to divorce the BOCs and Bellcore from the daily administration of the SMS. This independent third party will receive a set fee for its administrative services, which will be largely ministerial in nature. This fee will represent its only payment for its services; it will receive no share in the overall revenues from the SMS operation. The BOCs and Bellcore will retain general control over this operation, including the establishment of rates and SMS software development.[41]

31. Under these circumstances, we believe that the BOCs should file the SMS tariff. Through Bellcore, the BOCs control all fundamental aspects of SMS access. The third-party administrator, on the other hand, is merely a subcontractor with ministerial caretaking responsibilities performed on behalf of the BOCs and Bellcore. We further direct that the BOCs file a single joint tariff, or that one BOC file a tariff in which the others concur, for this service. Since there is only one SMS, there should be a single tariff for SMS access. This tariff should contain SMS prices, terms, and conditions, including eligibility requirements for RESPORGs and rules governing RESPORG responsibilities, and should be filed by March 5, 1993.

C. RESPORG Eligibility

1. CompTel Petition

32. CompTel asks that the Commission clarify that any entity, including LECs and third parties, may act as a RESPORG on behalf of a provider of 800 services.[42] CompTel asserts that many small IXCs may lack the resources necessary to serve as RESPORGs. CompTel says that these IXCs will be unable to serve as customers' RESPORGs, or they will have to rely on other entities to provide RESPORG services for them. CompTel urges that the Commission afford these IXCs the broadest possible range of choices for RESPORG service. Specifically, CompTel asks that any IXC be permitted to delegate RESPORG responsibilities to any entity it chooses, including a LEC or a user. CompTel argues that this choice would bring the benefits of greater competition to RESPORG services and enable IXCs to obtain the best possible RESPORG services at the best possible prices. CompTel also claims that this would free small IXCs from having to rely on their IXC competitors for RESPORG services, which, CompTel notes, would place small IXCs in the position of having to provide sensitive customer information to their competitors.

2. Positions of the Parties

33. Users support CompTel's petition and, in fact, advocate even broader RESPORG eligibility.[43] Users urge that they be able to serve as their own RESPORGs, even if they are not so designated by an 800 service provider.[44] Users argue that this would provide them with greater control over their own network operations and would make it easier for them to change IXCs.[45]

34. Virtually all of the smaller IXCs, except Allnet, also support the CompTel proposal.[46] Like CompTel, these parties express concern about having to defer to or rely on their IXC competitors for RESPORG services, and argue that CompTel's proposal would promote competition in the provision of RESPORG services. WilTel proposes that Bellcore require RESPORGs to meet minimum financial eligibility requirements in order to ensure that each RESPORG can reimburse any party injured by the RESPORG's misuse of the data base.[47]

35. LECs also support CompTel's proposal. LECs maintain that the industry has approved guidelines that would permit resellers, LECs, and third parties to be RESPORGs.[48] They argue that this expansive approach to RESPORG eligibility will maximize users' choices and possibly result in cost savings.[49]

36. AT&T and MCI, however, maintain that only purchasers of interstate 800 access or their designees should be allowed to serve as RESPORGs.[50] Both AT&T and MCI say that restricting RESPORG eligibility in this manner would not unduly restrict the alternatives for the provision of RESPORG services. MCI argues that the start-up costs for RESPORGs will not be so high as to prevent smaller IXCs from performing RESPORG functions for themselves, particularly if SMS access is provided pursuant to tariff.[51]

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[41] *See, e.g.*, letter from Anthony M. Alessi, Director -- Federal Regulatory, Ameritech, to Donna Searcy, Secretary, FCC, January 28, 1993; letter from Marie Breslin, Director, FCC Relations, Bell Atlantic, to Donna Searcy, Secretary, FCC, March 13, 1992. *See also* 800 Data Base Access Service Implementation Plan, March 2, 1992, pp. 32-34.

[42] CompTel Petition at 9-11.

[43] Ad Hoc Comments at 10-12; ARINC Comments at 4; First Financial Reply at 4-6; ICA Comments at 4; National Data Comments at 4-6.

[44] National Data Comments at 4-6.

[45] National Data Comments at 5-6.

[46] ITN Comments at 2-5; LinkUSA Comments at 2; Metromedia Comments at 2; TMA Comments at 2-3; USLink Comments at 1; WilTel Comments at 4-5. Allnet Comments at 7-8.

[47] WilTel Comments at 5.

[48] Bell Companies Comments at 3.

[49] *Id.* at App. F. *See also* letter from Whitney Hatch, Assistant, Vice President Regulatory Affairs, GTE, to Richard M. Firestone, Chief, Common Carrier Bureau, FCC, February 14, 1992.

[50] AT&T Comments at 5-7; MCI Comments at 6-8.

[51] MCI Comments at 7.

37. AT&T and MCI also argue that allowing entities that are not access purchasers or their designees to serve as RESPORGs could interfere with the relationship between an IXC and its customer and undermine the control of facilities-based carriers over their own networks. They assert, for example, that a third-party RESPORG could orchestrate shifts in traffic among IXC networks that could wreak havoc on those networks.[52] AT&T argues further that allowing entities that do not purchase access to serve as RESPORGs could interfere with the efficient provisioning of 800 service.[53] MCI asserts that since the RESPORG will bear primary responsibility for addressing trouble reports, it is essential that the RESPORG be fully capable of interacting with the SMS and providing trouble management for all participating carriers. MCI asserts that purchasers of 800 access or their designees are best suited to this task.[54] MCI argues also that third parties should not be allowed to serve as RESPORGs without assurances that they will bear the full financial responsibility for the consequences of their actions.[55]

38. Sprint agrees that IXCs should not have to rely on another IXC for RESPORG services, but urges that there be some restrictions on who may serve as a RESPORG. Sprint argues that allowing 800 service customers to serve as their own RESPORGs could lead to conflict with the prohibition against LEC marketing of vertical features directly to IXCs' customers. Sprint also asserts that the CompTel proposal is overbroad and raises network security concerns.[56] Sprint maintains that CompTel's concerns could be addressed by authorizing the NASC administrator to perform RESPORG functions at the request of an 800 service provider in situations involving service orders contrary to the interests of the RESPORG.[57] Sprint concludes that any 800 service provider, including regional carriers (though not switchless resellers), should be able to serve as a RESPORG.[58]

39. CompTel responds that traffic management concerns of large IXCs can be met by requiring RESPORGS to obtain IXC verification and approval before effectuating service orders that will add traffic to IXC networks.[59] CompTel also states that IXCs have strong incentives to select as RESPORGs only those entities that would provide adequate service.

40. SWBT, responding to AT&T and MCI, asserts that LECs should be permitted to serve as RESPORG for any customer that purchases either purely intraLATA 800 service or "complementary 800 service," where the customer purchases intraLATA 800 service from a LEC and interLATA service from an IXC.[60] SWBT argues that a customer that uses a LEC for intraLATA service is as much a LEC's customer as it is an IXC's customer. It claims that if it is unable to offer RESPORG services to these customers, it will have to refer customers to IXCs for RESPORG functionalities. Under that scenario, SWBT asserts, IXCs would have an unfair competitive advantage in intraLATA 800 service.[61]

3. DISCUSSION

41. We now hold that any entity that meets reasonable financial, technical, and service-related eligibility criteria (which will be set forth in the SMS/RESPORG tariff) may act as RESPORG and that users should be able to choose any qualified entity to serve as RESPORG for their 800 service. Pursuant to our decision, users will be able to elect to serve as their own RESPORG, or they may use an IXC, LEC, or some third party to perform RESPORG services for them. The choice will be that of the user. We also find that IXCs should be permitted to subcontract RESPORG services to any entity that meets the RESPORG eligibility requirements contained in the SMS/RESPORG tariff.

42. We believe that the public interest will be best served by affording users the widest possible choice of RESPORGs for their 800 service. A wide range of options should enable users to choose a RESPORG that best meets their individual needs. For example, a user that will be using multiple IXCs may wish to use a neutral third party or a LEC as RESPORG, or even serve as its own RESPORG. Our decision here will enable that user to do so. Moreover, more choices should result in better and cheaper RESPORG services.

43. AT&T and MCI argue that only 800 access purchasers or their designees should be permitted to serve as RESPORGs. They argue that any further expansion of eligibility criteria could create network disruption and adversely affect the provisioning of 800 service. These concerns, we believe, are unfounded. The industry is establishing RESPORG guidelines that will ensure that RESPORGs coordinate the placement of service orders with the carriers that are affected by them, and we are requiring that those guidelines be set forth in the SMS/RESPORG tariff. We expect that these guidelines will include requirements that, prior to placing any service order in the SMS, RESPORGs notify and obtain the acceptance of any carrier to which they will be sending 800 traffic. Thus, these guidelines should ensure that RESPORG activities are satisfactorily coordinated with all carriers. Indeed, these guidelines would have to be the primary means of ensuring proper coordination of RESPORG activities and 800 service provisioning in any event, because 800 service subscribers will be free to use multiple IXCs, including multiple facilities-based carriers in an 800 data base environment. Therefore, limiting RESPORG eligibility to access purchasers or their designees would offer little benefit, while unduly restricting the options of customers and carriers.

44. Likewise, we do not believe we should preclude LECs from serving as RESPORGs at the user's election. First, we agree with SWBT that when a LEC provides intraLATA 800 service to a user, the LEC is as much an 800 service provider for that user as the IXC (or IXCs) providing interLATA service to that user. Absent some compelling reason, we do not believe that LECs should be precluded from serving as RESPORG for their own 800

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[52] AT&T Comments at 6; MCI Comments at 7-8, Reply at 9.

[53] *Ex parte* letter from Karen Weis, Division Manager, Federal Regulatory Affairs, AT&T to Donna Searcy, Secretary, FCC, December 29, 1992.

[54] MCI Reply at 9-10.

[55] MCI Reply at 9.

[56] Sprint Comments at 8-9.

[57] Sprint Comments at 10. Sprint has presented this proposal in a separate petition for declaratory ruling, which is currently pending. *See* Sprint Petition for Declaratory Ruling and Request for Further Proceedings, filed July 10, 1992, in CC Docket No. 86-10.

[58] Sprint Comments at 10.

[59] CompTel Reply at 10.

[60] SWBT Comments at 3-5.

[61] SWBT Comments at 5.

subscribers, or that they should be forced to refer their customers elsewhere for RESPORG services. Second, some users that do not use a LEC for intraLATA 800 service may nevertheless wish to use a LEC as RESPORG to facilitate their use of multiple IXCs and avoid any potential conflicts of interest between their RESPORG and competing 800 providers.

45. Nor has any party presented any good reason why LECs should be precluded from serving as RESPORGs. Concerns that allowing users to choose LECs as RESPORGs would interfere with the IXC/customer relationship are mitigated by our rules that prohibit LECs from selling interLATA vertical features directly to end users. That prohibition continues to remain in effect. Thus, while a user might be able to employ a LEC as RESPORG, LECs may sell vertical features for interLATA services only to IXCs or other access purchasers.

46. We also conclude that users should be permitted to serve as their own RESPORGs, provided that they meet the eligibility requirements applicable to all RESPORGs. Some large users state that they wish to serve as their own RESPORGs because they believe that this will give them more control over their 800 traffic and facilitate their ability to change carriers or routing instructions quickly. While we believe this option will be pursued by a relatively small number of users, we find no reason to deny these users this flexibility through a blanket rule precluding such arrangements. While some parties express concerns about the qualifications of users to serve as RESPORGs, these parties offer no specific reason why a user that meets tariffed eligibility requirements would be nevertheless ill-suited to serve as a RESPORG. As noted, more RESPORG options should result in better, less expensive RESPORG services.

47. Finally, we agree with CompTel that IXCs should be permitted to subcontract RESPORG services to any entity that meets the tariffed guidelines as to technical, financial, and service-related eligibility requirements. Allowing small IXCs this option will enable them to offer RESPORG services to their customers and compete more effectively in the 800 services market. Moreover, as CompTel notes, the more options its members have in choosing RESPORGs, the better their ability to offer their customers better services and lower prices.

IV. ORDERING CLAUSES

48. Accordingly, pursuant to the authority contained in Sections 1, 3, 4, 201-205 and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 153, 154, 201-205, and 208, IT IS ORDERED that the Petition for Declaratory Ruling filed June 19, 1992 by the Competitive Telecommunications Association IS HEREBY GRANTED as described in this order.

49. IT IS FURTHER ORDERED that the Bell Operating Companies shall file an SMS access tariff as described herein by March 5, 1993, to be effective **May 1, 1993.**[62]

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Comments on CompTel Petition filed July 10, 1992

Ad Hoc Telecommunications Users Committee (Ad Hoc)

Aeronautical Radio, Inc. (ARINC)

Allnet Communications Services, Inc. (Allnet)

American Telephone and Telegraph Company (AT&T)

Ameritech, Bell Atlantic, BellSouth, NYNEX, Pacific Bell, Nevada Bell, and US West (the Bell Companies)

Cable & Wireless Communications, Inc. (Cable & Wireless)

GTE Service Corporation (GTE)

Independent Telecommunications Network, Inc. (ITN)

International Communications Association (ICA)

LDDS Communications, Inc. (LDDS)

LinkUSA Corporation (LinkUSA)

Metromedia Communications Corporation (Metromedia)

MCI Telecommunications Corporation (MCI)

National Data Corporation (National Data)

Southwestern Bell Telephone Company (SWBT)

Sprint Communications Company LP (Sprint)

Telecommunications Marketing Association (TMA)

United States Telephone Association (USTA)

USLink Long Distance (USLink)

WilTel, Inc. (WilTel)

Reply Comments on CompTel Petition filed July 17, 1992

Ad Hoc

Allnet

AT&T

the Bell Companies

Cable & Wireless

CompTel

[62] Good cause exists for making this order effective on less than 30 days notice. This will ensure that SMS access tariffs are filed by **March 5, 1993**, so that there will be adequate time for their review.

First Financial Management Corporation (First Financial)

MCI

Sprint

USTA

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WJG MARITEL CORPORATION — File No. I-T-D-93-001

Application for authority to close Public Local Service Coast Station KAD836, Marysville, Michigan

Application for authority to close Public Local Service Coast Station KQB66, Detroit, Michigan — File No. I-T-D-93-002

ORDER AND AUTHORIZATION

Adopted: February 23, 1993; Released: March 4, 1993

By the Chief, International Facilities Division:

1. The captioned applications, filed on October 19, 1992 by WJG Maritel Corporation (WJG), request authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to discontinue service from Public Local Service Coast Stations KAD836, located at Marysville, Michigan and KQB666, located at Detroit, Michigan. WJG wishes to discontinue service during the winter months, ending March 31, 1993. Station KAD836 is located in St. Clair County, Michigan and serves the area between Lake Erie and Lake Huron, both pleasure craft and commercial traffic. Station KQB666 is located at Detroit, Michigan and serves primarily the same area and traffic. The applications were placed on public notice on October 28, 1992. No comments were received.

2. The basic statutory test to be applied by this Commission in considering applications for discontinuance of common carrier services to a community is found in Section 214(a) of the Act. Under this Section, the Commission may permit discontinuance of service upon a finding that "neither the present nor future public convenience and necessity will be adversely affected" by the proposed action. Application of this standard presents the Commission with a task of balancing the financial burden that would be imposed on the carrier by continued operation of its facilities with the needs and interests of the user community.[1]

3. In support of its applications, WJG states that it wishes to close both stations during the winter months due to minimal traffic. During the period of discontinuance, all calls to both stations would be referred to Central Radio Telegraph, Rogers City, Michigan which operates station KIL926 and other public local service coast stations in the state of Michigan. Distress calls are handled by the U.S. Coast Guard.

4. Upon consideration of the applications and in view of the foregoing, IT IS HEREBY CERTIFIED that neither the present nor the future public convenience and necessity will be adversely affected by the temporary discontinuance of service via stations KAD836 and KQB666.

5. Accordingly, IT IS ORDERED, that Applications File Nos. I-T-D-93-001 and I-T-D-93-002 ARE GRANTED, and WJG is authorized to discontinue service from its Public Local Service Coast Stations KAD836 and KQB666 for the period, ending March 31, 1993.

6. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or application for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[1] Public Coast Radiotelegraph Stations, 67 FCC 2d 790 at 795 (1978).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

COMMUNICATIONS SATELLITE CORPORATION — File No. I-T-C-92-141

For authority pursuant to Section 214 of the Communications Act of 1934, as amended, to provide satellite services between the United States and Cuba

ERRATA

Released: March 4, 1993

By the Chief, International Facilities Division:

1. On February 1, 1993, a *Memorandum, Opinion, Order and Authorization* in the above-captioned proceeding was released, DA 93-78. The instant errata changes the regulation referenced in paragraphs 1(a), 4, and 5(a) from 31 CFR § 515.41(b) to 31 CFR § 515.542(b) and changes the regulation referenced in paragraphs 1(b), 4, and 5(b) from 31 CFR § 515.41(c) to 31 CFR § 515.542(c).

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

San Marcos Long Distance, Inc. — File No. I-T-C-93-009-TC

Application for authority pursuant to Section 214 of the Communications Act of 1934, as amended, for transfer of control of authorization to resell international switched voice and data services

MEMORANDUM, OPINION AND ORDER

Adopted: February 23, 1993; Released: March 4, 1993

By the Chief, International Facilities Division:

1. On October 19, 1992, San Marcos Long Distance, Inc. (SMLD) filed the above-captioned application pursuant to Section 214 of the Communications Act of 1934, as amended, and Section 63.01 of the Commission's Rules requesting authority to transfer control of SMLD and its Section 214 authorization to SMT Acquisition Corp. (SMTAC). The application was put on public notice on October 28, 1992, and no comments were received.

2. SMLD is a Texas corporation wholly-owned by SM Telecorp, Inc. (SMTI). SMLD has authority to resell international switched voice and data services between the U.S. and various international points.[1] SMTAC is a Texas corporation formed for the purpose of this merger, and wholly-owned by Century Telephone Enterprise, Inc. (CTEI). CTEI is a publicly-traded corporation whose subsidiaries are engaged in the provision of landline message telephone service and common carrier radio service. As of December 31, 1991, CTEI had total book value assets of $764,539,000. According to a letter filed by the applicant on February 11, 1993, CTEI is not a foreign owned carrier for the purposes of application of the Commission's international competitive carrier policies, and therefore SMTAC would be eligible to operate under the regulatory requirements established for non-dominant international carriers in *International Competitive Carrier Policies*.[2]

3. The application states that under the proposed transaction, SMTI will be merged with and into SMTAC with SMTAC as the surviving corporation. SMTAC will then be renamed SM Telecorp Incorporated. Thus, upon completion of the merger, SMLD will be a wholly-owned subsidiary of SMTAC (the new SM Telecorp Incorporated), which will be a wholly-owned subsidiary of CTEI. The application further maintains that there will be no discontinuance of service, and SMLD will continue to provide service to the public in the same manner as is now provided. SMLD has a tariff on file with the Commission, and the proposed transaction is not designed to result in any changes in charges or regulations. Accounting will continue to be performed in accordance with standard accounting practices and applicable Commission Rules. Applicant states that the transaction is in the public interest because the public in the areas presently served will continue to receive the same service with only a change in the controlling interest of the service provider.

4. In view of the foregoing, we conclude that the transfer of control of SMLD and its Section 214 authorization to SMTAC (the new SM Telecorp Incorporated) will not adversely affect the public interest.

5. Accordingly, IT IS ORDERED, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, and Section 63.01 of the Commission's Rules, 47 C.F.R. § 63.01, that the application of San Marcos Long Distance, Inc., File No. I-T-C-93-009-TC, IS GRANTED and we consent to the transfer of control of SMLD and its Section 214 authorization originally granted in File No. I-T-C-91-169 (*see* n.1) to SMTAC (the new SM Telecorp Incorporated).

6. IT IS FURTHER ORDERED, pursuant to Section 203 of the Communications Act, as amended, 47 U.S.C. § 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, that SMLD must continue to maintain tariffs for the services authorized in this order.

7. IT IS FURTHER ORDERED that SMLD must file annual reports of overseas telecommunications traffic as required by Section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61.

8. IT IS FURTHER ORDERED that SMLD is limited, under this order, to the provision of international switched voice and data services by the resale of the international switched voice and data services set forth in AT&T Tariff FCC Nos. 1 and 2, MCI Tariff FCC No. 1, US Sprint Tariff FCC No. 1, and Vyvx Tariff FCC No. 1 between the U.S. and the international points listed in those tariffs in accordance with SMLD's previous authorization (*see* n.1).

9. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services the applicant seeks authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

10. This order is issued under Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules, 47 C.F.R. §§ 1.106, 1.115, may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2), 47 C.F.R. § 1.4(b)(2)).

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[1] San Marcos Long Distance, Inc., File No. I-T-C-91-169, 6 FCC Rcd 5274 (1991).

[2] International Competitive Carrier Policies, 102 FCC 2d 812 (1985), *recon. denied*, 60 RR 2d 1435 (1986) (hereinafter *International Competitive Carrier Policies*).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-260

In the Matter of

Implementation of the Cable
Television Consumer Protection
and Competition Act of 1992

Cable Home Wiring

REPORT AND ORDER

Adopted: February 1, 1993; Released: February 2, 1993

By the Commission: Commissioner Marshall not participating.

I. INTRODUCTION

1. On November 6, 1992, in response to Section 16(d) of the Cable Television Consumer Protection and Competition Act of 1992,[1] this Commission released a Notice of Proposed Rule Making.[2] In that Notice we sought comment regarding rules concerning "the disposition, after a subscriber to a cable system terminates service, of any cable installed by the cable operator within the premises of such subscriber." Sixty-eight comments and reply comments were filed in response to the Notice.[3]

2. The comments reveal that the current general policy within the cable industry is to leave cable home wiring in place after a subscriber terminates service. The record indicates that this is done because it often costs a cable operator more to remove the wire than it is worth. Also, in the majority of cases, the terminating subscriber is vacating the premises and it is expected that the new resident will again seek cable service. Even where a terminating subscriber is not vacating the premises, a cable company presumably wants the opportunity to re-connect service to be as convenient and economical as possible, should the resident seek so. In rare cases, however, the subscriber terminates cable service in order to take service from an alternative video provider; these cases will probably increase as competition to cable develops. The legislative history states that in some of these instances the cable operator seeks to remove the wire without providing the subscriber the opportunity to acquire it, thereby increasing the cost and inconvenience to the subscriber of having new wiring installed.[4]

3. After consideration of the record, we today prescribe rules which prohibit cable operators from removing cable home wiring upon termination of service before giving the subscriber the opportunity to acquire the wiring. These rules most directly and appropriately effect the statutory language and the apparent goals of the legislation, which are to avoid the disruption of having the wiring removed and to allow subscribers to utilize the wiring with an alternative multichannel video delivery system.[5] We also decline to adopt rules that go beyond the statutory provisions as some parties had urged. Further we address the issues of compensation and signal leakage.

II. DISCUSSION

A. General Scope and Definitions

4. The rules adopted here follow the plain language of the statute, and require cable operators to provide subscribers the opportunity to acquire cable home wiring before removing it from subscribers' premises upon termination of service. Specifically, cable home wiring is defined as that wiring located within the premises or dwelling unit of the subscriber that has been installed by the cable operator or its contractor. The rules provide further that, in those cases where the cable home wiring does not already belong to the subscriber, upon voluntary termination by the subscriber, the cable system operator must provide the subscriber the opportunity to acquire the wiring before the operator removes it.[6] Mindful of our mandate, the majority of the commenters did not take issue with rules tailored in such a manner.

5. While the statute directs us to apply rules concerning the disposition of cable home wiring after a subscriber terminates service, some commenters asked that we apply the rules at the time of installation.[7] Others argued that to do so would be contrary to the legislative intent and would complicate a cable operator's service responsibilities.[8] The rules adopted here follow the statutory language and apply at termination. We do not think it is necessary or appropriate under the statute to apply them before the point of termination.[9]

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[1] Pub. L. No. 102-385, Section 16(d), 106 Stat. 1460 (1992)("Cable Act of 1992"), *to be codified at* 47 U.S.C. Section 544(i). The Commission must prescribe rules by February 2, 1993.

[2] Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Cable Home Wiring, *Notice of Proposed Rule Making*, 7 FCC Rcd 7349 (1992)("Notice" or "NPRM").

[3] A list of the commenting parties, including the abbreviations we use herein, is attached as Appendix A.

[4] H.R. Rep. No. 628, 102d Cong. 2d Sess. at 118 (1992)("House Report"); Senate S. Rep. No. 92, 102d Cong. 1st Sess. at 23 (1991)("Senate Report").

[5] House Report at 118.

[6] The mechanics of the new rules are discussed in subsection b, *infra*. The text of the rules is set forth in Appendix B.

[7] *See e.g.*, Liberty comments at 5 (cable home wiring becomes a fixture at time of installation); NTCs comments at 4.

[8] *See e.g.*, Joint Operators comments at 5 ("...compulsory transfer prior to termination would unduly complicate a cable operator's responsibility to control signal leakage and to charge for additional outlets.").

[9] A few commenters wanted us to apply the rules only to terminations involving service installations after the effective date of the rules. Joint Parties comments at 2; Continental comments at 6 (apply only to new contracts); NCTA comments at 11 (grandfather existing agreements concerning home wiring and apply new rules prospectively); Time Warner comments at 19-20. We agree with the numerous commenters who argued that to do so would effectively undermine congressional intent

6. A number of commenters urged us to follow the language of the Senate Report and adopt a regulatory scheme similar to that applied to telephone inside wiring by which consumers may remove, replace, rearrange, or maintain telephone wiring inside the home, even though it might be owned by a telephone company.[10] Bell Atlantic argued that telephone inside wiring-type rules should apply regardless of whether a consumer has terminated service.[11] We note, however, that the language of the statute refers only to disposition of cable home wiring after termination of service. Many of the telephone inside wire provisions go well beyond the statutory language addressing cable home wiring because they pertain to what the consumer can do with the wire while receiving service. We further agree with the many commenters who argued that cable home wiring is distinguishable from telephone inside wiring in that, for example, cable operators have signal leakage responsibilities not borne by telephone service providers.[12] Although we generally believe that broader cable home wiring rules could foster competition and could potentially be considered in the context of other proceedings, because of the time constraints under which we must promulgate rules as required by the Cable Act of 1992, we decline to address such rule proposals in this proceeding.[13]

7. In accordance with the legislative history, which specifically recognizes the problem of signal theft, the rules we adopt today apply only to voluntary termination of service and do not apply when service has been terminated for lack of payment or for theft of service.[14] A number of commenting parties argued that operators should be allowed to remove wiring to prevent theft of service.[15] Continental states that cable operators should be able to remove the wire when there is a reason to believe that there is a potential for theft.[16] NATOA disagrees with that proposition.[17] MAP argues that the definition of nonpayment should not include late payments or billing disputes.[18] We agree with MAP that late payments or billing disputes should not be considered service theft for purposes of this rule. Nor should a perceived threat of theft of service be sufficient to prevent a subscriber from benefiting from the use of his or her cable home wiring. Accordingly, we find that cable operators may remove the cable home wire of a subscriber where they have terminated service for lack of payment or for theft of service under their existing termination guidelines. An exception to this rule is where ownership of the cable home wiring has been previously transferred to the subscriber by the operator. In that case, the wiring is no longer the operator's property to remove.

8. As proposed in the NPRM, we define cable home wiring to mean only the cable itself and not any active elements such as amplifiers, decoder boxes or similar apparatuses. This is in accord with the legislative intent[19] and was not disputed by the commenting parties.

9. The rules also apply only to wiring installed by the cable operator or its contractor. Many commenters urged us to apply the rules to all wiring used to deliver broadband video services.[20] They argued that we can do so under our ancillary jurisdiction and that such an approach would promote competition in the provision of video service. While we agree that this proposal may merit consideration at a later date, we believe that it is beyond the scope of this proceeding. We agree with those commenters who argued that the plain language of Section 16(d) applies only to cable operator-installed wiring. Moreover, we sought comment only on wiring installed by cable operators. Accordingly, the rules we hereby adopt will apply only to cable wiring installed by the cable operator or its contractor.

10. The legislative history indicates that Congress intended the rule provisions adopted in this rule making to apply to cable home wiring located within the premises of the subscriber, *i.e.*, the internal wiring contained within the home or individual dwelling unit and not the wiring outside the home or the common wiring in apartment buildings and such.[21] The comments differed on whether the wiring in common areas of multi-dwelling unit (MDU) buildings should fall within the definition of premises, and whether "loop through" wiring[22] should be excluded even though it is located within the subscriber's dwelling unit.

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as the majority of homes are already wired and already subscribe to cable service. MAP reply at 4 (application to new installations only would render the rules useless); TCI reply at 2; NATOA reply at 3. Accordingly, we apply the rules prospectively to all terminations occurring after the effective date of our rules.

[10] Senate Report at 23.

[11] Bell Atlantic comments at 1. *See also* APPA comments at 14; BICSI comments at 3 ("The customer/owner should have control of cable home wiring in the same manner permitted for simple telephone wiring."); Citizens reply at 3-4; EIA/CEG comments at 6 (employ telephone wiring model in cable environment); CFA comments at 3 (parallel rules should be adopted); GTE reply at 2-3; Multiplex comments at 6 (cable operators should be required to charge separately for cable wiring); NTCs comments at 4 (cable service customers should be afforded control over cable home wiring upon installation); Pacific Companies comments at 2 (treat cable wiring in parity with telephone inside wiring); Schaeffer comments at 1 (regulations should be the same for cable companies and telephone companies); Schwartz comments at 1 ("The cable subscriber should be responsible for all cable wiring in the home."); City of Seattle comments at 1 (once wiring is installed it should become property of homeowner); USTA comments at 4 (adapt inside wire rules to cable home wiring); UTC comments at 4 (policies on the use of telephone inside wiring provide excellent model); WCA comments at 8.

[12] *See e.g.* Joint Parties comments at 8; Cablevision comments at 6.

[13] *See also* House Report at 118 ("This section does not address matters concerning the cable facilities inside the subscriber's home prior to termination of service.")

[14] *See* House Report at 118 ("Because theft of service increases the cost of service for all consumers, the Committee believes that the rules and regulations promulgated by the Commission under this section should not pertain to situations where service has been terminated for nonpayment or for theft of service.").

[15] CATA comments at 3; TCI comments at 13-14; Time Warner comments at 18-19.

[16] Continental comments at 4.

[17] NATOA reply at 3.

[18] MAP reply at 3.

[19] House Report at 118.

[20] *See e.g.* Joint Operators comments at 6; TCI comments at 10-11.

[21] House Report at 118-19.

[22] A loop system is one in which a single cable traverses an MDU building floor by floor, unit by unit. If the cable is broken or removed, all subsequent units are unable to receive cable signals.

11. With regard to single family homes, several suggestions were made regarding the appropriate demarcation point. Some of the commenters proposed that the demarcation point should be set at the ground block, typically located on or near the outside wall of the dwelling.[23] TCI, among others, proposed that, in those cases where there is no ground block, the demarcation point should be set by the operator at or near the wall of the residence.[24] Bell Atlantic stated that the demarcation point should be at the "minimum point of entry into the home or building.[25] We adopt a rule consistent with the legislative history and comments and set the demarcation point for single unit installations at (or about) twelve inches outside of where the cable wire enters the outside wall of the subscriber's premises. This should give alternative providers adequate access to the cable home wiring so that they may connect the wiring to their systems without disrupting the subscriber's premises.

12. More controversial was the issue of where the demarcation point should be in multi-dwelling units. Many of the commenters argued that common wiring and "loop through" wiring should be excluded. Some proposed that the demarcation point should be at the wall plate inside the subscriber's unit.[26] Others argued that, in order to meet the legislative goal of fostering competition among providers, the demarcation point should be outside the unit where the dedicated wiring for the unit begins.[27] For the same reasons noted above with respect to single family homes, we set the demarcation point for multi-dwelling units at (or about) twelve inches outside of where the cable wire enters the outside wall of the subscriber's individual dwelling unit. We exclude so called "loop through" wiring, even though it is in the individual dwelling units, because of the nature of "loop through" configurations. To include such wiring in our rules would give the initial subscriber in the loop control over the cable service of all remaining subscribers on the wire.

B. Compensation

13. One of the more controversial issues in this proceeding concerns the amount of compensation a cable operator should receive when a subscriber opts to purchase his or her cable home wiring. Many commenters argued that we should allow cable operators to recover any unrecovered investment in cable home wiring upon termination of service.[28] Almost all of the cable commenting parties asserted that uncompensated permanent use of the cable operator's wiring would be an unconstitutional taking.[29] The comments vary, however, on when compensation is warranted and how it should be determined. ACTA submits that "a termination charge would be warranted if the subscriber chooses to have the cable removed from the premises, and a charge representing the cost of the equipment would be warranted if the subscriber wishes to have the cable left in place."[30] The Local Governments and the City of New York argued that the subscriber should be presumed to own the home wiring if: "a) the subscriber has paid an installation fee or the installation fee was waived by the cable operator; b) the subscriber has maintained cable service for a reasonable minimum period, such as one year; or c) the franchise agreement specifies a reduced installation fee or no installation fee."[31] WJB argued that the Commission "should establish a strong presumption that the inside wiring belongs to the homeowner."[32]

14. With regard to the proper amount of compensation, the Joint Operators argued that the amount "should be no more than (1) the average unrecovered cost of inside wiring for comparable installations or (2) the cost of replacement, whichever is greater."[33] BellSouth stated that the Commission could employ book cost.[34]

15. The record reveals that, in many circumstances, the cable home wiring already belongs to the subscriber, having been transferred by the operator and/or paid for by the subscriber pursuant to specific agreement. In these situations further compensation is not warranted. For example, where the cable operator has transferred ownership of inside wiring at installation or termination of service, or has been treating the wiring as belonging to the subscriber for tax purposes, or the wiring is considered to be a fixture by state or local law in the subscriber's jurisdiction,[35] then the subscriber already has the right to use the cable with an alternative provider without further compensation and may not be prevented from doing so by the cable operator.

16. In those remaining situations, we conclude that, before removing the cable home wiring upon voluntary termination of service, the cable operator must first give the subscriber the opportunity to acquire it. Thus, when a subscriber who does not already own his or her cable home wiring voluntarily terminates service, the cable operator has two choices: it may leave the wiring in place or seek to remove it. Where cable is left in place after service is discontinued, it is reasonable, and consistent with the objectives of the statute, to conclude and to provide in our rules that the wiring is available for alternative uses by the former subscriber or new resident.

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[23] Viacom reply at 5; TCI reply at 2; NTCs comments at 4-5.

[24] TCI reply at 2-3; BellSouth comments at 5.

[25] Bell Atlantic reply at 6.

[26] Joint Parties comments at 11; Viacom reply at 5; NCTA comments at 9; Time Warner comments at 6; NPCA comments at 2-4; TCI reply at 4 ("define MDU inside wiring as that inside the unit, including wiring in internal walls, but excluding any wiring in common walls or other common areas"); BellSouth comments at 9 (not further than twelve inches from where the wiring first enters the subscriber's dwelling unit).

[27] *See e.g.* Liberty comments at 2.

[28] BellSouth comments at 5-6; Cablevision comments at 4-5 ("...operator is entitled to an amount equal to the fair market value of the wiring."); NCI comments at 4 (operator should receive fair market value); TMCT comments at 6 (if FCC does become involved in compensation, it should be based on going concern value); TKR comments at 11 (operator should get fair value for wiring as may be agreed upon between the subscriber and the cable operator).

[29] *See e.g.* Joint Operators comments at 3; NCTA comments at 4, citing *Loretto v Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); Comcast reply at 4.

[30] ACTA comments at 2.

[31] Local Government comments at 2; City of New York comments at 6.

[32] WJB comments at 8.

[33] Joint Operators comments at 3.

[34] BellSouth comments at 6.

[35] NCTA comments at 4 (if the subscriber owns the wiring - either because it is a fixture or has otherwise been conveyed - the operator presumably has no right to remove it).

17. The operator may instead seek to remove the cable home wiring. As noted above, we recognize that there may be situations where the cable system operator owns the internal wiring and desires to remove it when service is terminated involuntarily, *i.e.*, where there is theft of service involved.[36] In such situations removing the wiring should help ensure that additional theft of service is not facilitated, and the operator is not required to give the subscriber the opportunity to acquire it. In all other situations, however, the rules will require that the cable operator give the subscriber the option of purchasing the wiring rather than having it removed.[37]

18. Where the subscriber is given the option of purchasing the wiring, the question arises as to what the price should be.[38] We believe, and the rules will provide, that only the value of the wire itself on a per foot replacement cost basis should be allowed.[39] It could be argued, from the point of view of the subscriber, that the cost of the internal wiring has already been paid, in whole or in part, through the initial installation charge. From the point of view of the system operator, it could be argued that investment in the installation itself, in addition to the physical plant, should be chargeable. Based on the record before us, we conclude that, if there has been no specific transfer of ownership of the cable wiring, there is no way of attributing all or a portion of the initial installation charge or any portion of subscription fees specifically to purchase of the home wiring. Cable fees, where they have not been regulated and where there is no contractual or other specific understanding with the subscriber, have not generally been cost based or designed to recover the costs of specific portions of the cable plant but rather have been based in large measure on a variety of marketing considerations. Low or discounted installation charges (often well below cost) are charged to overcome initial sales resistance or to respond to changes in demand that are seasonally based; by contrast, higher fees are sometimes charged to discourage subscriber "churn" or to speed up capital recovery. In either event, the subscriber's concern has been with receipt of a package of cable programming services and the system operator's concern has been with overall return. In the absence of any other understanding, subscriber payments for cable service typically have not been made for a specific part of the system operation. We thus find that there is no ready means of attributing either installation fees or some portion of a subscriber's monthly charges to the subscriber's acquisition of the inside wiring. Accordingly, we will not presume that subscribers have paid for their cable home wiring where they have not been charged directly for that cost. At the same time, we will not allow the system operator to collect for the cost of labor involved in the installation of the cabling as opposed to the physical plant itself. This is not a salvageable expense if the cable were removed nor can we conclude that there was a reasonable expectation that compensation would be received for it above and beyond any installation charge that has already been levied.

19. Consequently, the rules will provide that the cable operator must offer the cable home wiring to the subscriber for the replacement cost of the wiring itself. This charge may be based on a reasonable approximation of what the length of cabling is in the subscriber's premises. When the subscriber calls to terminate service, however, the cable operator is required, if it proposes to remove the wiring, to inform the subscriber that he or she may purchase the wire and what the cost per foot charge is. These requirements, we believe, fairly accommodate the statutory objective of facilitating competitive choice, will compensate cable operators for otherwise recoverable expenses, will protect the interests of subscribers in the physical appearance of their property, and, where it is desired, will allow the subscriber to make alternative uses of inside wiring at a modest price.

20. If the cable operator chooses to remove the wire, offers the subscriber the opportunity to acquire it at the replacement cost of the cable home wiring, and the subscriber refuses the offer, then the cable operator may remove the wiring within 30 days of the refusal. If, however, the operator does not remove the wiring within 30 days, it may make no subsequent attempt to remove it or to restrict its use.[40] If the operator does remove the cable home wiring, it must do so at no charge to the subscriber and must pay for any damage caused by the operator's removal of existing wiring, as currently required by 47 U.S.C. Section 541(a)(2).[41]

21. With regard to future installations, cable operators may employ whatever cost recovery method they deem appropriate consistent with these rules and any relevant rules the Commission promulgates in its outstanding rate proceeding.[42]

C. Signal Leakage

22. Many of the comments echoed the concern expressed in the Notice about cable signal leakage that causes interference to licensed over-the-air services, including aeronautical and safety-of-life services. There was almost unanimous consent that the cable operator who installed

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[36] Viacom reply at 7. Viacom also requested that the operator be able to remove the wiring where the costs had not been recovered.

[37] The record indicates that it is unlikely that subscribers would seek to have their wiring removed. Liberty comments at 4 (no one wants existing cable home wiring removed); Viacom reply at 3 (there is very little likelihood the terminating subscriber will request removal of the wiring).

[38] Of course, as previously mentioned, if the subscriber has already contracted for and purchased the wiring in conjunction with its initial installation or ownership of the wiring has otherwise been transferred, no additional charge may be levied upon termination of service. *See* para. 15, *supra*.

[39] We would expect any charge per foot to be based on the replacement cost of coaxial cable in the community. For example, the record indicates that new coaxial cable is being sold for six cents per foot by District Cablevision in Washington, D.C. APPA reply at 5. A subscriber who believes he or she was required to pay too much, or refuses to pay under protest and has the wire removed by the cable operator, could file a complaint with the FCC.

[40] The rules we adopt today do not affect or change the rights of cable operators concerning access to a subscriber's property and premises.

[41] *See e.g.* Joint Operators comments at 4 ("If no compensation is paid, an operator may remove the wiring or abandon it in place.").

[42] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation* (Notice of Proposed Rulemaking), MM Docket No. 92-266, FCC 92-544, adopted December 10, 1992.

the cable home wiring should not be held responsible for signal leakage if the cable operator is no longer providing cable service.[43] We agree. A cable operator will not be held responsible for facilities over which it does not provide service. Because these rules apply only after service termination, the responsibilities of cable operators to prevent signal leakage while providing service remain unaltered. *See* Sections 76.613, 76.617 and Part 15.

III. FINAL REGULATORY ANALYSIS

23. Pursuant to the Federal Flexibility Act of 1980, the Commission's final analysis is as follows:

I. Need and purpose of this action:

This Order prescribes rules as required by Section 16(d) of the Cable Act of 1992. The new rules adopted in this proceeding allow subscribers to acquire cable home wiring upon voluntary termination of service in order to use it for alternative video providers and to avoid the disruption of having the wiring removed.

II. Issues raised in response to the Initial Regulatory Flexibility Analysis:

There were no comments submitted in response to the Initial Regulatory Flexibility Analysis.

III. Significant alternatives considered:

The rules adopted follow the statutory language. Certain commenters urged us to adopt broader rules. Upon consideration, we determined that because of the tangential issues raised by such proposals and the time constraints under which we must promulgate rules, we would limit the rules to the language of the statute.

IV. ORDERING CLAUSES

24. Authority for the rules adopted herein is contained in Section 16(d) of the Cable Act of 1992, *to be codified at* 47 U.S.C. Section 541(i), and Sections 4(i), 4(j), and 303(r) of the Communications Act of 1934, 47 U.S.C. Sections 154(i), 154(j), and 303(r).

25. Accordingly, IT IS ORDERED THAT Part 76 of the Commission's rules IS HEREBY AMENDED as shown in Appendix B.

26. IT IS FURTHER ORDERED THAT the rule changes made herein WILL BECOME EFFECTIVE [30 days after Federal Register publication].

27. IT IS FURTHER ORDERED THAT this proceeding IS HEREBY TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[43] ACTA comments at 3; Joint Parties comments at 9; Cablevision comments at 8.

APPENDIX A

Comments

Adams CATV, Inc.	(Adams)
Allen's TV Cable Cable Television Association of Maryland, Delaware, and the District of Columbia, Century Communications Corp., Columbia International, Inc., Gilmer Cable Television Co., Inc., Helicon Corp., OCB Cablevision, Inc., Telecable Corporation, Texas Cable Television Association, Western Communications, Inc., Zylstra Communications Corp.,	(Joint Operators)
Americable International, Inc.	(Americable)
American Public Power Association	(APPA)
Arizona Cable Television Association	(ACTA)
Bell Atlantic telephone companies	(Bell Atlantic)
BellSouth Corporation	(BellSouth)
Blade Communications, Inc., Cablevision Industries Corp., Crown Media, Inc., Multimedia Cablevision, Inc., Multivision Cable TV Corp., ParCable, Inc., Providence Journal Company, Sammons Communications, Inc.,	(Joint Parties)
Building Industry Consulting Service International	(BICSI)
Cablevision Systems Corporation	(Cablevision)
Cleveland Heights, City of	(Cleveland)
Community Antenna Television Association, Inc.	(CATA)
Consumer Electronics Group of the Electronic Industries Association	(EIA/CEG)
Consumer Federation of America*	(CFA)
Continental Cablevision, Inc.	(Continental)
Liberty Cable Company, Inc.	(Liberty)
Media Access Project	(MAP)
Mitsubishi Rayon America Inc.	(MRA)
Multiplex Technology, Inc.	(Multiplex)
National Association of Telecommunications Officers and Advisors National League of Cities, United States Conference of Mayors, National Association of Counties	(Local Governments)
National Cable Television Association, Inc.	(NCTA)
National Private Cable Association and	(NPCA)

MaxTel Cablevision	
Nationwide Communications Inc.	(NCI)
New York City Department of Telecommunications and Energy	(City of New York)
New York State Commission on Cable Television	(NYSCCT)
Nynex Telephone Companies, New England Telephone & Telegraph New York Telephone Company	(NTCs)
Pacific Bell and Nevada Bell	(Pacific Comp.)
Secretary of Defense	(Defense)
Schaeffer, Paul F.	(Schaeffer)
Schwartz, George	(Schwartz)
Seattle, City of, Department of Administrative Services	(City of Seattle)
Square D Company	(Square D)
Times Mirror Cable Television, Inc.	(TMCT)
Tele-Communications Inc.	(TCI)
Time Warner Entertainment Company, L.P.	(Time Warner)
TKR Cable Company	(TKR)
United States Telephone Association	(USTA)
Utilities Telecommunications Council	(UTC)
Wireless Cable Association International. Inc.	(WCA)
WJB-TV Limited Partnership	(WJB)

Reply Comments

Allen's	
APPA	
Bell Atlantic	
Bentleyville Telephone Company*	(Bentleyville)
Cablevision	
California Cable Television Association	(CCTA)
Citizens for a Sound Economy Foundation	(Citizens)
Comcast Corporation	(Comcast)
CATA	
GTE Service Corporation	
Local Governments	
MAP	
Michigan Municipal Electric Association	(MMEA)
NCTA	
National Telephone Cooperative Association	(NTCA)
New Jersey Cable Television Association*	
New Jersey Office of Cable TV, State of	(State of NJ)
New York State Commission on Cable Television	(NYSCCT)
Northwest Municipal Cable Council	(NMCC)
NTCs	
Southern New England Telephone	(SNET)
TCI	
Time Warner	
TKR	

USTA
Viacom
WCA
WJB

* ex parte comments

APPENDIX B

Part 76 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 76 continues to read as follows:

AUTHORITY: Secs. 2, 3, 4, 301, 303, 307, 308, 309, 48 Stat., as amended, 1064, 1065, 1066, 1081, 1082, 1083, 1084, 1085; 47 U.S.C. 152, 153, 154, 301, 303, 307, 308, 309.

2. Section 76.5 is amended to add subsection (ll) and (mm) to read as follows:

Section 76.5 Definitions.

* * * * *

(ll) Cable home wiring. The internal wiring contained within the premises of a subscriber which begins at the demarcation point. Cable home wiring does not include any active elements such as amplifiers, converter or decoder boxes, or remote control units.

(mm) Demarcation Point. (1) For new and existing single unit installations, the demarcation point shall be a point at (or about) twelve inches outside of where the cable wire enters the subscriber's premises. (2) For new and existing multiple unit installations, the demarcation point shall be a point at (or about) twelve inches outside of where the cable wire enters the subscriber's dwelling unit, but shall not include loop through or other similar series cable wire.

3. Part 76 is amended by adding the following subpart:

Subpart M -- Cable Home Wiring

Section 76.801 Scope.

The provisions of this subpart set forth rules and regulations for the disposition, after a subscriber voluntarily terminates cable service, of that cable home wiring installed by the cable system operator or its contractor within the premises of the subscriber. The provisions do not apply where the cable home wiring belongs to the subscriber, such as where the operator has transferred ownership to the subscriber, the operator has been treating the wiring as belonging to the subscriber for tax purposes, or the wiring is considered to be a fixture by state or local law in the subscriber's jurisdiction. Nothing in this subpart shall affect the cable system operator's rights and responsibilities under Section 76.617 to prevent excessive signal leakage while providing cable service, or the cable operator's right to access the subscriber's property or premises.

Section 76.802 Disposition of Cable Home Wiring.

Upon voluntary termination of cable service by a subscriber, a cable system operator shall not remove the cable home wiring unless it gives the subscriber the opportunity to acquire the wiring at the replacement cost, and the subscriber declines. The cost is to be determined based on the replacement cost per foot of the cabling multiplied by the length in feet of the cable home wiring. If the subscriber declines to acquire the cable home wiring, the cable system operator must then remove it within 30 days or make no subsequent attempt to remove it or to restrict its use.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 92-80

In the Matter of

Amendment of Parts 1, 2 and
21 of the Commission's Rules
Governing Use of the Frequencies
in the 2.1 and 2.5 GHz Bands

REPORT AND ORDER

Adopted: January 14, 1993; Released: February 12, 1993

By the Commission:

I. INTRODUCTION

1. On April 9, 1992, we adopted the *Notice of Proposed Rule Making* that commenced this proceeding, soliciting public comment on a variety of proposals aimed at reducing the delays associated with the processing of applications for stations in the Multipoint Distribution Service (MDS).[1] In this *Report and Order*, we take final action adopting several of the proposals advanced in the *Notice*. Specifically, by our action today we are amending our rules in a manner designed to streamline the MDS regulatory scheme and curtail the filing of speculative MDS applications. The rule changes adopted in this item will serve the public interest by improving the conditions for competition in the multichannel video distribution marketplace in accordance with our goals and the Congressional directives recently set forth in the Cable Television Consumer Protection and Competition Act of 1992.[2]

II. BACKGROUND

2. The instant proceeding is the latest in a series of rule makings initiated by this agency to inspire more vigorous competition and greater diversity of consumer choices in the multichannel video delivery marketplace. In other actions designed to facilitate these objectives, we recently adopted rule changes permitting local telephone companies to participate in the video distribution market through the provision of video dialtone services and limited ownership of video programming,[3] and modified our rules to remove the ban on network ownership of cable television systems.[4] In addition, over the course of the past five years, we have conducted a number of proceedings with the goal of removing regulatory obstacles to the growth of "wireless cable"[5] as a viable contender in the multichannel video distribution arena.[6] The regulatory changes adopted in this item are an extension of our efforts in this latter category.

3. Despite various efforts to structure our rules and policies in a manner likely to foster the effective delivery of wireless cable service, the wireless cable industry has not yet fully realized its competitive potential. As indicated in the *Notice*, this is due to some extent to the fact that approximately 20,000 MDS applications, some dating back as far as the 1983 filing period, have been pending before the Commission for several years.[7] Due in part to this large and aging backlog, wireless cable operators have had difficulty amassing the number of channels necessary to meet subscriber demand and match competitors' offerings.[8] In the meantime, delays in the processing of MDS applications and other obstacles to the expansion of wireless cable systems, such as unfair or discriminatory practices in the sale of video programming,[9] have allowed traditional cable

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[1] Notice of Proposed Rule Making, PR Docket No. 92-80, 7 FCC Rcd 3266 (1992) [hereinafter *Notice*]. As in the *Notice*, throughout this proceeding "MDS" will be used to refer collectively to the single channel (MDS) and multichannel (MMDS) authorizations unless otherwise indicated. We take final action in this proceeding amending our rules to reflect this practice.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) (Cable Act of 1992).

[3] Second Report and Order, CC Docket No. 87-266, 7 FCC Rcd 5069, 5070 (1992) (public interest objectives of the video dialtone proceeding include promoting additional competition and diversity of services in the video and general communications markets).

[4] Report and Order, MM Docket No. 82-434, 7 FCC Rcd 6156, 6163 (1992) (rationale for allowing networks to own cable systems includes the expectation of enhanced competition and greater diversity of programming available to viewers).

[5] "Wireless cable" is a multichannel video distribution medium that resembles cable television, but that uses microwave channels rather than coaxial cable or wire to transmit programming to subscribers. Report and Order, CC Docket No. 86-179, 2 FCC Rcd 4251, 4252 (1987). The term "wireless cable" as used in this context does not imply that the service constitutes cable television for any statutory or regulatory purpose. *See* Report and Order, MM Docket No. 89-35, 5 FCC Rcd 7638, 7639-41 (1990) (the definition of a cable system does not include transmissions such as MDS), *vacated on other grounds sub nom.* Beach Communications, Inc. v. FCC, 965 F.2d 1103 (D.C. Cir. 1992).

[6] *See, e.g.*, Report and Order, CC Docket No. 86-179, 2 FCC Rcd 4251 (1987)(adopting rule changes permitting licensees to use MDS frequencies on either a common carrier or non-common carrier basis and holding program origination rules inapplicable to MDS operations); Report and Order, MM Docket No. 89-35, 5 FCC Rcd at 7639-41 (issuing ruling that wireless cable systems should not be subject to franchise requirements); Report and Order, Gen Docket Nos. 90-54, 80-113, 5 FCC Rcd 6410 (1990) (adopting rule changes increasing the availability of MDS channels for use in wireless cable systems by eliminating MDS ownership restrictions and simplifying certain rules governing the application process); Second Report and Order, Gen. Docket No. 90-54, 6 FCC Rcd 6792 (1991) (reallocating the three OFS H-channels to the MDS). *See also* Order on Reconsideration, Gen. Docket Nos. 90-54, 80-113, 6 FCC Rcd 6764 (1991).

[7] *Notice*, 7 FCC Rcd at 3267. *See also* Notice of Inquiry, MM Docket No. 89-600, 5 FCC Rcd 362, 367-68 (1989).

[8] Typically, wireless cable operators use some combination of thirteen MDS channels available to them on a full-time basis (Channels 1 and 2A, or in some cases Channel 2, Channels E1-E4, F1-F4, and H1-H3), and twenty channels in the Instructional Fixed Television Service (ITFS) (Channels A1-A4, B1-B4, C1-C4, D1-D4, and G1-G4) available to them on a leased, part-time basis, to transmit video entertainment programming to subscribers. *See Notice*, 7 FCC Rcd at 3266, n.8.

[9] Notice of Proposed Rule Making, Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and

television systems to strengthen their position in the multichannel video distribution marketplace, making it more difficult for rival providers to come forth as meaningful competitors.[10]

4. We initiated PR Docket No. 92-80 with the principal objective of promoting the expansion of wireless cable by expediting the processing of MDS applications. Specifically, in the *Notice* we proposed, *inter alia*, to (1) relocate some or all aspects of the processing of MDS applications and the regulation of the MDS to either the Private Radio Bureau or the Mass Media Bureau;[11] (2) streamline the rules and technical standards used to govern the MDS by (i) replacing the interference protection criteria contained in 47 C.F.R. § 21.902 with fixed co- and adjacent-channel distance separation standards;[12] and (ii) amending the requirements currently contained in 47 C.F.R. §§ 21.15(a) and 21.900, pursuant to which an MDS applicant must demonstrate that it is legally, financially, technically, and otherwise qualified to render service, that there are frequencies available to enable the applicant to render satisfactory service, and that the applicant has an available station site, to instead require a certification that these things are true;[13] (3) deter the filing of speculative applications by (i) adopting rule changes disallowing settlement agreements among MDS applicants; (ii) expanding the one-to-a-market rule to prohibit MDS applicants from holding any interest in more than one application for the same channel or channels at sites within the same area;[14] and (iii) strengthening the rules that prohibit the assignment or transfer of conditional MDS licenses prior to completion of construction, and amending 47 C.F.R. § 21.29 to prohibit substantial changes in ownership of pending MDS applications;[15] and (4) utilize a new MDS lottery procedure.[16] In addition, to stop the prodigious influx of MDS applications and to permit us to develop an up-to-date comprehensive database, we imposed a short-term, temporary freeze on the filing of applications for new stations in the MDS.[17]

III. DISCUSSION

A. Relocation of MDS processing, interference protection criteria, processing procedures.

5. Since the adoption of the *Notice*, we have made significant headway toward reducing the backlog of pending MDS applications. To a large degree, we credit the imposition of the freeze and the hiring of additional staff to work on MDS applications and related pleadings with this progress. We now believe that the advances we have made in the direction of eliminating the backlog, coupled with the development of a comprehensive consolidated database and the rule changes adopted herein streamlining the MDS regulatory process and deterring the filing of speculative applications, render certain of the more extreme proposals set forth in the *Notice* superfluous. Specifically, this includes (1) the proposal to relocate the processing and/or regulation of the MDS to another bureau within the Commission, (2) the proposal to replace the existing interference protection criteria with fixed distance separation standards, and (3) the proposal to adopt a new lottery procedure. Accordingly, we have decided not to proceed with these proposals.[18]

B. Rule Changes.

6. Modification of 47 C.F.R. §§ 21.15(a) and 21.900. In their present form, 47 C.F.R. §§ 21.15(a) and 21.900 require an MDS applicant to demonstrate (1) that it is legally, financially, technically, and otherwise qualified to render the proposed service; (2) that there are frequencies available to enable it to render satisfactory service; and (3) that it has a station site available. As mentioned, in the *Notice* we proposed to replace the showing currently required of MDS applicants under these rules with a certification requirement. The commenters that addressed this proposal are essentially evenly split. Generally, those commenters that support the proposal contend that the adoption of a certification requirement, particularly if coupled with the use ofa simplified MDS application form, would help expedite processing and ease the burden on applicants.[19] Commenters that oppose the certification proposal

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Diversity in Video Programming Distribution and Carriage, 8 FCC Rcd 210 (1992) (On Dec. 10, 1992 FCC proposed rules pursuant to the Cable Act of 1992 regarding access to programming.). *See* Notice of Proposed Rule Making and Notice of Inquiry, Gen. Docket Nos. 90-54, 80-113, 5 FCC Rcd 971, 980 n.10 (1990).

[10] *Notice*, 7 FCC Rcd at 3267.

[11] *Id.* The *Notice* also solicited comment as to whether MDS processing and regulation should remain in the Common Carrier Bureau.

[12] *Id.* at 3268-69.

[13] *Id.* at 3270.

[14] *Id.*

[15] *Id.* at 3270 n.33.

[16] *Id.* at 3271-72.

[17] The freeze on the filing of applications for new MDS stations was effective immediately upon adoption of the *Notice*. *See Notice*, 7 FCC Rcd at 3270. *See also* Public Notice, PR Docket No. 92-80 (Private Radio Bureau April 15, 1992) (delineating the terms of the freeze). The freeze does not apply to MDS/MMDS modification, assignment, transfer of control, extension, or signal booster applications. The specific frequencies affected by the freeze include those identified in 47 C.F.R. § 21.901 and the ITFS frequencies available to MDS entities pursuant to 47 C.F.R. § 74.990. We anticipate that the freeze will remain in place at least through the end of the third quarter of 1993, but we will re-evaluate the status of the remaining backlog in July, 1993 to determine whether that estimate should be revised.

[18] The comments filed in response to these proposals do not favor a contrary result, even in the environment that existed at the time the *Notice* was adopted. For example, the commenters were essentially evenly split on the proposal to relocate the processing and/or regulation of the MDS to another bureau. Although the question of where within the Commission the processing and regulation of the MDS should be performed is purely an internal agency matter and, as such, need not have been presented for public comment, *see* 5 U.S.C. § 553(b)(A), the commenters' views were nevertheless informative. In addition, the commenters almost unanimously opposed the proposal to replace the interference protection criteria set forth in 47 C.F.R. § 21.902 with preset co- and adjacent-channel distance separation standards. Few commenters discussed the proposed lottery procedure.

[19] *See, e.g.*, Comments of WCA at 72; Comments of Fletcher, Heald & Hildreth at 25. We are planning to modify the MDS application form to make it responsive to the rule changes adopted in this proceeding and to eliminate any irrelevant terms.

generally do so out of concern that the use of certifications in lieu of the detailed showing currently mandated under Sections 21.15(a) and 21.900 may invite speculation by making it easier for insincere entities to prepare and file "cookie cutter" applications.[20]

7. Because of our strong interest in deterring the filing of speculative MDS applications,[21] we have been especially cautious in analyzing the comments filed in response to the proposed certification procedure. After careful consideration, we are confident that the rule changes adopted in this proceeding disallowing settlement groups, prohibiting applicants from holding any interest in more than one application for the same channel or channels at sites within the same area, and restricting the transfer of MDS applications and conditional licenses will amply counteract any encouragement of speculative filings that might otherwise have resulted from the conversion to certifications for site availability.[22] Moreover, we continue to believe as stated in the *Notice*, that the use of certifications in lieu of the detailed showing required under Section 21.15(a) in its present form will help expedite processing by reducing the number of components of each MDS application that must be reviewed extensively by Commission staff.[23] Indeed, in our view, the small risk of increased speculation presented by the conversion to certifications of site availability in the circumstances at hand is far outweighed by the increased efficiency that will result from the use of certifications.[24] Accordingly, we take final action adopting our proposal to modify 47 C.F.R. § 21.15(a) to provide that MDS applicants may certify rather than demonstrate station site availability. [25]

8. We are not, however, adopting our proposal to convert 47 C.F.R. § 21.900 into a general certification requirement from the existing requirement of demonstrating one's legal and technical qualifications. Upon further contemplation, we are not convinced that the conversion to a certification for these components of the application will significantly expedite processing. In addition, we are concerned that utilization of certifications for these types of qualifications may invite speculation. Consequently, we are retaining Section 21.900 in its present form.

9. Finally on this issue, we wish to make clear our intention to respond to the submission of a false certification under 47 C.F.R. § 21.15(a) by employing all available remedies, including the dismissal with prejudice of all applications filed by the offending applicant or the revocation of authorizations. In addition, if evidence of intent exists, we will refer such cases to the Department of Justice for criminal prosecution under 18 U.S.C. § 1001. Furthermore, we will treat the submission of an intentionally falsified certification as a reflection on an applicant's basic qualifications to become or to remain a licensee.

10. Rule Changes Designed to Reduce Speculation. We are also adopting the proposals set forth in the *Notice* that seek to deter the filing of speculative MDS applications. First, we adopt our proposal to disallow partial and full settlement agreements among MDS applicants, and to apply this prohibition to both pending and future applications.[26] Almost unanimously, owners and operators of wireless cable systems that filed comments in this proceeding endorse this proposal.[27] Some commenters contend, however, that applying the ban to pending applications will accomplish little by way of deterring speculation because the applications in question have already been filed.[28] In addition, certain commenters challenge our legal authority to apply the ban on settlement agreements to pending applications.[29] Finally, other commenters disagree with our underlying assumption that settlement agreements encourage speculation.[30]

11. After reviewing the record, we remain certain that the adoption of our proposal to disallow settlement groups will deter the filing of speculative applications and, consequently, promote the public interest objectives of this proceeding. As discussed in the *Notice*, prior to the imposition of the freeze on further filings, applications for new MDS stations were being submitted at the rate of approximately 1000 per month.[31] The number of MDS authorizations that have been cancelled or forfeited for failure to construct is one of several indicia that many of these

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[20] *See, e.g.*, Comments of Champion Industries, Inc. at 10; Comments of BF Investments at 10; Comments of Spectrum Analysis & Frequency Engineering, Inc. (SAFE) at 16; Comments of the Consortium of Concerned Wireless Cable Operators at 19.

[21] *See Notice*, 7 FCC Rcd at 3267 & n.14.

[22] *See infra* paras. 10-14.

[23] *Notice*, 7 FCC Rcd at 3270.

[24] We wish to make clear, however, that an applicant assumes the risk that a site may not be available to complete construction in a timely manner during the initial construction period. Applicants are reminded that requests for an extension of time to construct for lack of site availability are not granted. 47 C.F.R. § 21.40(b).

[25] In response to a suggestion advanced by the Federal Communications Bar Association, *see* Comments of FCBA at 10, we are also amending Section 21.15(a) to eliminate the requirement that an MDS applicant whose access to or use of its station site is somehow limited or conditioned by a lease or other agreement to use land must file a copy of the lease or agreement with its application. In lieu of this requirement, applicants must certify compliance with any such agreement.

[26] *See Notice*, 7 FCC Rcd at 3270.

[27] *See, e.g.*, Comments of Baypoint TV, Inc. at 10; Comments of Fletcher, Heald & Hildreth at 23; Comments of Champion Industries, Inc. at 11-12; Comments of BF Investments, Inc. at 11-12; Comments of Mutli-Micro, Inc. at 11-12; Comments of Choice TV of Michiana, Inc. at 11-12; Comments of Wireless Cable, Inc. at 11-12; Comments of Cardiff Broadcasting Group at 11-12; Comments of WJB TV Melbourne Ltd Partnership, et al. at 12; Comments of Hardin & Associates at 7; Comments of Marshall Communications, Inc. at 8; Comments of Phase One Communications, Inc. at 10-11; Comments of Kingswood Associates at 13. The Wireless Cable Association International, Inc. supports the settlement ban as applied to future applications. WCA believes, however, that settlements should be permitted among pending applicants because in its view, it is unlikely that many applicants will withdraw. Reply Comments of WCA at 12.

[28] *See* Comments of American Telecommunications Development, Inc. at 2-6; Comments of Coalition for Wireless Cable at 10-11; Comments of International Communications Group, Inc. at 6-8; Comments of Simon A. Hershon and Mary D. Drysdale, Tenants by the Entirety at 5; Reply Comments of WCA at 10.

[29] *See, e.g.*, Comments of International Communications Group, Inc. at 8; Comments of Coalition for Wireless Cable at 11. In addition, over 550 identical form letters were filed in this proceeding challenging our legal authority to prohibit settlement agreements among pending applicants.

[30] Comments of USIMTA at 13; Comments of SBA at 21.

[31] *Notice*, 7 FCC Rcd at 3267 & n.14.

applications may be speculative.[32] Frequently, applicants participate in settlement groups to increase their chances of winning the lottery and diffuse the risk of losing their investment. Many of these applicants do not intend to construct an MDS station and instead wish to have their application granted solely for the purpose of later selling their authorization to wireless cable operators in need of spectrum. By disallowing settlement agreements, we will deter such abuse of MDS lotteries, thereby reducing the number of speculative applications filed. This in turn will facilitate the proper utilization of spectrum and conserve the Commission's resources.

12. As mentioned above, there is some disagreement among the commenters as to whether we should apply the prohibition on settlement agreements to pending applications. We believe that the benefits of applying the ban prospectively to pending filings will be numerous. While we recognize that this will not in and of itself deter speculation, it will nevertheless be beneficial in helping to ensure that speculative applicants are not rewarded. Nor are we persuaded by the argument that we lack legal authority to apply the settlement ban to applications pending as of the effective date of our new rules. It is well-settled that the rules applicable to previously-filed applications may be amended.[33] *See United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956); *Hispanic Information & Telecommunications Network, Inc. v. FCC*, 865 F.2d 1289 (D.C. Cir. 1989). Accordingly, we amend 47 C.F.R. §§ 21.33(b) and 21.901(f)(1) to delete the portions of these rules that allow the formation of settlement agreements among MDS applicants.[34]

13. We also adopt our proposal to prohibit MDS applicants from holding any interest, including a corporate interest of less than one percent, in more than one application for the same channel or channels at sites in the same geographic area, and to apply this new rule to pending applications.[35] As discussed in the foregoing paragraph, this rule change operates hand-in-hand with our rule changes eliminating settlement agreements. Therefore, we take final action amending 47 C.F.R. § 21.901(d)(2) to provide that no applicant for a station in the MDS may file more than one application per station per channel or channel group within one geographic area[36] and that the stockholders, partners, owners, trustees, beneficiaries, officers, directors, or any other person or entity holding *any interest* in one application for a particular channel or channel group in a particular area must not have any interest, directly or indirectly, in another application for the same channel or channel group within the same geographic area. Applicants with pending applications that violate the provisions of this new rule may, in the 14 day period following the effective date of the rule changes adopted in this proceeding, amend their applications to divest themselves of any interests held in other applications. All applicants are advised to take advantage of this opportunity to amend: as proposed in the *Notice*, we will not grant an authorization to any entity, including tentative selectees, with any interest whatsoever in another application or applications for the same channel or channel group in the same geographic area.[37]

14. Finally, we have also decided to adopt our proposals to amend 47 C.F.R. §§ 21.29 and 21.39 to further restrict the circumstances in which we will permit the transfer of an interest in MDS applications and conditional licenses prior to the completion of construction.[38] Specifically, we are amending Sections 21.39(a) and 21.29 to provide that the sale, transfer, assignment or other alienation of any interest in an MDS application or conditional license will be prohibited prior to the completion of construction except (1) in cases involving involuntary transfers such as the licensee's bankruptcy, death or legal disability; and (2) in cases involving *pro forma* transfers of ownership or control of the authorized facilities. The adoption of these rule changes will supplement the ban on the formation of settlement agreements by prohibiting common settlement transactions that include options to buy. In addition, the amendment of Sections 21.29 and 21.39 will eliminate the administrative burden and processing delays associated with amendments and modifications seeking changes in the ownership of pending MDS applications and MDS conditional licenses.

15. Some commenters express concern that the amendment of Sections 21.39(a) and 21.29 could have a negative impact on the development of the wireless cable industry by preventing legitimate business transactions.[39] We are convinced, however, that the exceptions to the prohibition in the case of involuntary and *pro forma* transfers will afford wireless cable operators the necessary flexibility to engage in legitimate business transfers.[40] In addition, a

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[32] *See Notice*, 7 FCC Rcd at 3270 n.32. To date, over 600 MDS authorizations have been cancelled or forfeited for failure to construct.

[33] Our existing rules permit the formation of settlement groups only after an application has been placed on public notice designating it for lottery and prior to a prescribed ten-day deadline before the lottery. Except for MMDS applications filed in 1983 which have been placed on public notice designating the applications for lotteries on February 26, 1993, and are exempt from the settlement ban, *see* note 34 *infra*, no applications in this status are currently on file.

[34] The only exception to the settlement ban as applied to pending applications will be in the case of those applicants whose applications have already been placed on a Lottery Notice, and who have formed settlement groups pursuant to 47 C.F.R. § 21.33(b) after the issuance of the relevant Lottery Notice, but prior to April 1, 1993, the effective date of this change.

[35] Only three commenters addressed this proposal, and all three support it. *See* Comments of WCA at 30-31; Comments of WJB TV at 9; Comments of "WCCI at 3.

[36] In other words, no applicant may hold an interest in two or more mutually exclusive MDS applications.

[37] *Notice*, 7 FCC Rcd at 3271.

[38] *Id.* at 3275-76.

[39] *See* Comments of the Consortium of Concerned Wireless Cable Operators at 21; Comments of WCA at 44-45; Comments of SBA at 20-21.

[40] As proposed in the *Notice*, we are also adding 47 C.F.R. § 21.29(f) and amending 47 C.F.R. §§ 21.23 and 21.31 to prohibit the filing of amendments seeking more than a *pro forma* change in ownership or control. We are not adopting various other suggestions advanced by the commenters as methods to deter speculative MDS filings. Specifically, we decline to adopt WCA's suggestions that we revise the structure of MDS filing fees, and that we modify the definition of a protected service area, *see* Comments of WCA at 34, 36-39. Although WCA's suggestion concerning the fee structure could prove beneficial, Congressional authority is required for us to restructure fees in this manner. We considered and declined to adopt several requests that we expand an MDS station's protected service area in the

wireless cable operator seeking to participate in the transfer of a pending MDS application or conditional license in circumstances other than those permitted by the rules remains free to petition the Commission for a waiver of the general prohibition on such transactions.

C. Additional Rule Changes to Expedite Processing of Future Applications.

16. At this time, we address several other proposals advanced either in the *Notice* or in the comments as suggested means for expediting the processing of future MDS filings. First, in the *Notice* we proposed to discontinue licensing low power signal boosters operated by licensees.[41] Most commenters support this proposal, and we have decided to adopt it.[42] In an effort to reduce the burden on Commission staff and on MDS applicants, we adopted rule changes in the Order on Reconsideration in Gen. Docket Nos. 90-54, 80-113, allowing pre-authorization construction and operation of low power signal boosters by MDS, MMDS and ITFS licensees in certain prescribed circumstances.[43] These rule changes have served to expedite processing without resulting, to our knowledge, in increased interference. Because of this success, we believe that further gains can be realized by discontinuing the licensing of low power signal boosters that under the current rules may be installed without prior authorization. Accordingly, we take final action herein modifying 47 C.F.R. §§ 21.913(g) and 74.985(g) to provide that MDS and ITFS licensees need not submit an application to install a low power signal booster. Licensees seeking to install a low power signal booster must, however, submit certification demonstrating compliance with the various components of Sections 21.913(g) and 74.985(g). This certification must be submitted within 48 hours of installation of the booster station.[44]

17. In addition, we agree with Hardin & Associates that future processing can be expedited by requiring MDS applicants to submit, upon initial filing of the MDS application, two maps.[45] One map must show the boundaries of the protected service areas of each authorized or previously-proposed co-channel station with a -transmitter site within 100 miles of the applicant's proposed transmitter site, and the 45 dB desired signal to undesired signal contour line of the applicant's proposed MDS station for co-channel stations. A second map must show the boundaries of the protected service areas of each authorized or previously-proposed adjacent-channel station with a transmitter site within 100 miles of the applicant's proposed transmitter site, and the 0 dB desired signal to undesired signal contour line of the applicant's proposed MDS station for adjacent-channel stations.[46] The submission of these two maps of protected service areas, as this term is defined in 47 C.F.R. § 21.902(d), will quickly highlight possible areas of interference or confirm the lack of the same, thereby further reducing the burden on Commission staff.[47] Accordingly, we are amending 47 C.F.R. § 21.902 to add the requirement that MDS applications filed after the lifting of the freeze must include the prescribed protected service area maps.[48]

Order on Reconsideration in Gen. Docket Nos. 90-54, 80-113, 6 FCC Rcd at 6765-66. We will not revisit this issue in this proceeding, but will revisit it with regard to a reconsideration petition in that proceeding. Champion Industries, Inc. and other commenters suggest that we prohibit educational and other ITFS entities from entering into lease agreements with any parties other than wireless cable operators. *See* Comments of Champion Industries, Inc. at 18. We are, however, constrained from considering Champion's suggestion because it is outside the scope of this proceeding, which is limited to the MDS processing scheme. Various other suggestions advanced by the Wireless Cable Connection, Inc. and Fletcher, Heald & Hildreth need not be discussed in detail because these suggestions are rendered redundant or unnecessary by other rule changes adopted in this proceeding. Finally, we reject on the merits USIMTA's suggestions that we replace the cut-off rule of Section 21.914 with a sixty-day cut-off rule, and that we restrict eligibility for MDS licensing to applicants who have not forfeited a previous MDS license. *See* Comments of USIMTA at 12-14. As discussed in the Report and Order in Gen. Docket Nos. 90-54, 80-113, 5 FCC Rcd at 6424, significant public interest benefits adhere in the cut-off rule of Section 21.914. USIMTA's suggested eligibility restriction would have a potentially detrimental impact on the wireless cable industry and would serve no useful purpose in view of the fact that more effective rule changes are being adopted in this proceeding.

[41] *Notice*, 7 FCC Rcd at 3268 n.20.

[42] *See, e.g.*, Comments of WCA at 73-73; Comments of The Consortium of Concerned Wireless Cable Operators at 24-27.

[43] Order on Reconsideration, Gen. Docket Nos. 90-54, 80-113, 6 FCC Rcd at 6767-68. The conditions for pre-authorization construction and operation of signal boosters are set forth in 47 C.F.R. §§ 21.913(g) and 74.985(g).

[44] By adopting this certification requirement, we have attempted to balance the interests of various ITFS and MDS entities that submitted comments in this proceeding. *See* Comments of the Consortium of Concerned Wireless Cable Operators at 25; Joint Comments of the Arizona Board of Regents, et al. at 10; Comments of the Roman Catholic Communications Corporation of the Bay Area at 6, 7.

[45] *See* Comments of Hardin & Associates at 6.

[46] *See* 47 C.F.R. § 21.902(f); *see also* 47 C.F.R. §§ 21.902(c)(1), 21.902(c)(2). *See also generally* Amendment of Parts 21, 74, and 94 of the Commission's Rules and Regulations with regard to the technical requirements applicable to the Multipoint Distribution Service, the Instructional Television Fixed Service and the Private Operational-Fixed Microwave Service (OFS), 98 FCC 2d 68 (1984).

[47] The 100-mile figure is based on a suggestion advanced by the Wireless Cable Association. *See* Comments of WCA at 71.

[48] We have given careful consideration to various other suggestions advanced by the commenters as means to expedite future processing, which we decline to adopt. Specifically, we refrain from adopting the suggestion advanced by Spectrum Analysis & Frequency Engineering Corp. (SAFE) that before filing, MDS applicants be required to obtain concurrence from previously granted system owners within 112 km. *See* Comments of SAFE at 6. Such a requirement would serve little purpose while imposing an additional burden on applicants and Commission staff. Although several commenters suggest that we modify the rules governing minimum ITFS programming requirements to allow licensees of multichannel ITFS systems to satisfy their cumulative requirements using one channel rather than each channel (*see* Comments of Champion Industries, Inc. at 16-17; Comments of Cardiff Broadcasting Group at 16-17; Reply Comments of WCA at 30-32) this proposal is outside the scope of the instant proceeding. We similarly decline to adopt SAFE's suggestion that in the future, we consider and process all 31 channels in a given market as one block. *See* Comments of SAFE at 4; Reply Comments of SAFE at 4-5. While we agree that such a procedure would permit the assembling of a maximum number of channels, numerous concerns, such as the treatment of ITFS channels, are implicated in a change of this nature. The record in this proceeding does not provide an adequate foundation for the resolution of these issues. Finally,

IV. CONCLUSION

18. In summary, we have adopted numerous changes in this proceeding to streamline the processing of applications for stations in the MDS. These rule changes are designed to eliminate various impediments to the development of wireless cable service. In turn, the emergence of wireless cable as a viable alternative to traditional cable offerings will serve the public interest by contributing to a more diversified and competitive video distribution marketplace.[49]

V. FINAL REGULATORY FLEXIBILITY ANALYSIS

19. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

I. Need and purpose of this action:

The adoption of this *Report and Order* will promote the public interest by furthering the Commission's goal of facilitating the development of a video distribution marketplace characterized by competition and a variety of consumer choices.

II. Summary of the issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis:

The Chief Counsel for Advocacy of the United States Small Business Administration (SBA) filed comments in response to the Initial Regulatory Flexibility Analysis. In these comments, the SBA stated that certain rule changes proposed in the *Notice*, particularly the pre-set separation standards, could disadvantage some small businesses by making it more difficult to secure financing.

III. Significant alternatives considered:

Several alternatives were discussed in the *Notice*. In addition, a number of alternative suggestions were raised in the comments. All significant alternatives have been addressed. Those proposals deemed problematic by the Small Business Administration are not being adopted.

VI. ORDERING CLAUSES

20. Accordingly, pursuant to the authority of Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 C.F.R. §§ 154(i) and 303(r), IT IS ORDERED that 47 C.F.R. Parts 2, 21 and 74 of the Commissions's Rules ARE AMENDED as set forth in the Appendix below, effective June 1, 1993, except for the ban on settlements which is effective April 1, 1993.

21. IT IS FURTHER ORDERED that applicants for stations in the MDS whose applications are currently pending before this Commission and who wish to amend their applications to bring them into conformance with the rule changes adopted in this proceeding may do so during the fourteen-day period beginning June 2, 1993 and ending June 15, 1993.

22. IT IS FURTHER ORDERED that the Secretary shall send a copy of this *Report and Order* to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §§ 601 *et seq* . (1981).

23. IT IS FURTHER ORDERED that PR Docket No. 92-80 IS TERMINATED.

24. For further information concerning this proceeding, contact Robert James, Common Carrier Bureau, (202) 634-1706.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

47 C.F.R. Parts 2, 21 and 74 are amended as follows:

PART 2 -- FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS

1. The authority citation for 47 C.F.R. Part 2 continues to read as follows:

AUTHORITY: Secs. 4, 302, 303, 307, 48 Stat., as amended, 1066, 1082; 47 U.S.C. §§ 154, 302, 303, 307, unless otherwise noted.

2. 47 C.F.R. § 2.106 is amended by removing note NG47 from column 5 in frequency band 2500-2655 MHz, and by adding "AUXILIARY BROADCASTING (74)" and "DOMESTIC PUBLIC FIXED RADIO (21)" under column 6 in frequency band 2500-2655 MHz, and by revising note NG47 to read as follows:

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we refuse to adopt several suggestions advanced by Champion Industries, Inc., Cardiff Broadcasting Group, Wireless Cable, Inc., Choice TV of Michiana, Inc., Multi-Micro, Inc., and BF Investments, Inc., to be applied to backlogged applications. These suggestions include the following: (1) that we expedite review of requests for reinstatement of channel groups that have been previously dismissed and that reinstatement be granted to all applicants who perfected their applications within 30 days of dismissal; (2) that MDS completion of construction deadlines be made common for all construction authorizations in a given market consistent with the last-granted construction authorization; and (3) that commercial ITFS applications filed in January and February of 1992 be immediately placed on public notice. The last of these suggestions is moot; the ITFS applications have been included in the consolidated data base and will be in the public release thereof. The other two suggestions are outside the scope of this proceeding. Moreover, however, it is undesirable on the merits for us to relax our construction deadlines. On the whole, these deadlines serve as an effective means of ensuring the proper utilization of spectrum and prompt delivery of service.

[49] At this juncture, we note that if, in view of the numerous rule changes adopted in this proceeding, any applicant whose application is currently pending withdraws prior to the issuance of the public notice designating its application for random selection, its application filing fees will be refunded. We interpret 47 C.F.R. § 1.1111(a)(4) to permit the refund of application fees paid by such entities.

§ 2.106 Table of frequency allocations.

* * * * *

NG47 In Alaska, frequencies between the band 2655-2690 MHz are not available for assignment to terrestrial stations.

* * * * *

PART 21 -- DOMESTIC PUBLIC FIXED RADIO SERVICES

3. The authority citation for 47 C.F.R. Part 21 continues to read as follows:

AUTHORITY: Secs. 1, 2, 4, 201-205, 208, 215, 218, 303, 307, 313, 314, 403, 404, 602, 48 Stat. as amended, 1064, 1066, 1070-1073, 1076, 1077, 1080, 1082, 1083, 1087, 1094, 1098, 1102; 47 U.S.C. Secs. 151, 154, 201-205, 208, 215, 218, 303, 307, 313, 314, 403, 404, 602; 47 U.S.C. 552.

4. 47 C.F.R. § 21.15 is amended by revising paragraph (a) to read as follows:

§ 21.15 Technical content of applications.

* * * * *

(a)(1) Except in the case of applicants for Multipoint Distribution Service stations, applicants proposing a new station location (including receive-only stations and passive repeaters) must indicate whether the station site is owned. If it is not owned, its availability for the proposed radio station site must be demonstrated. Under ordinary circumstances, this requirement will be considered satisfied if the site is under lease or under written option to buy or lease.

(2) Where any lease or agreement to use land limits or conditions in any way the applicant's access or use of the site to provide public service, a copy of the lease or agreement (which clearly indicates the limitations or conditions) must be filed with the application, except in the case of applicants for stations in the Multipoint Distribution Service. Multipoint Distribution Service applicants must instead certify compliance with the limitations and conditions contained in the lease or option agreement.

(3) Multipoint Distribution Service applicants proposing a new station location must certify the proposed station site will be available to the applicant for timely construction of the facilities during the initial construction period.

(4) An applicant's failure to include a certification required under this Section will result in dismissal of the application. The submission of a false certification will subject the applicant to all remedies available to the Commission, including the dismissal with prejudice of all applications filed by the offending applicant and the revocation of authorizations of the offending applicant. Also, if evidence of intent exists, the case will be referred to the Department of Justice for criminal prosecution under 18 U.S.C. § 1001. In addition, the submission of an intentionally falsified certification will be treated as a reflection on an applicant's basic qualifications to become or to remain a licensee.

* * * * *

5. 47 C.F.R. § 21.20 is amended by revising paragraph (b)(5) to read as follows:

§ 21.20 Defective applications.

* * * * *

(b) * * *

(5) The Multipoint Distribution Service application does not certify the availability of the proposed station site, or the Point-to-Point Microwave Radio Service, Local Television Transmission Service, or Digital Electronic Message Service application does not demonstrate the availability of the proposed site of a new facility;

* * * * *

6. 47 C.F.R. § 21.23 is amended by revising paragraphs (a) and (b) to read as follows:

§ 21.23 Amendment of Applications.

(a)(1) Any pending application may be amended as a matter of right if the application has not been designated for hearing, or forh)lcomparative evaluation pursuant to § 21.35, or for the random selection process, provided, however, that the amendments must comply with the provisions of § 21.29 as appropriate and the Commission has not otherwise forbidden the amendment of pending applications.

(2) A Multipoint Distribution Service application tentatively selected for qualification review by the random selection process may be amended as a matter of right up to 14 days after the date of the public notice announcing the tentative selection, provided, however, that the amendments must comply with the provisions of § 21.29 as appropriate and the Commission has not otherwise forbidden the amendment of pending applications.

(3) Provided, however, applications may not be amended if the amendments seek more than a *pro forma* change of ownership or control (bankruptcy, death or legal disability) of a pending Multipoint Distribution Service application and any amendment or application will be dismissed if the amendment or application seeks more than a *pro forma* change of ownership or control.

(b) Requests to amend an application designated for hearing or for comparative evaluation or for tentative selection for qualification review by the random selection process may be granted only if a written petition demonstrating good cause is submitted and properly served on the parties of record, except that Multipoint Distribution Service applications tentatively selected in a random selection process may be amended as a matter of right as provided in paragraph (a) of this section. Provided, however, requests to amend applications will not be granted that seek more than a *pro forma* change of ownership or control (bankruptcy, death or legal disability) of a pending Multipoint Distribution Service application and any application seeking more than a *pro forma* change of ownership or control will be dismissed.

* * * * *

7. 47 C.F.R. § 21.28 is amended by adding paragraph (f) to read as follows:

§ 21.28 Dismissal and return of applications.

* * * * *

(f) A Multipoint Distribution Service application will be dismissed if the applicant seeks to change ownership or control, except in the case of a *pro forma* change of ownership or control (bankruptcy, death, or legal disability).

8. 47 C.F.R. § 21.29 is amended by adding paragraph (f) to read as follows:

§ 21.29 Ownership changes and agreements to amend or to dismiss applications or pleadings.

* * * * *

(f) Notwithstanding Section 21.29(e) of this Part, amendments will not be granted that seek more than a *pro forma* change of ownership or control (bankruptcy, death, or legal disability) of a pending Multipoint Distribution Service application, and any Multipoint Distribution Service application will be dismissed that seeks more than a *pro forma* change of ownership or control.

9. 47 C.F.R. § 21.31 is amended by revising paragraphs (e)(3) and (4) to read as follows:

§ 21.31 Mutually exclusive applications.

* * * * *

(e) * * * * *

(3) The amendment reflects only a change in ownership or control found by the Commission to be in the public interest, and for which a requested exemption from the "cut-off" requirements of this section is granted, *unless* the amendment is for more than a *pro forma* change of ownership or control (bankruptcy, death or legal disability) of a pending Multipoint Distribution Service application in which event the application will be dismissed;

(4) The amendment reflects only a change in ownership or control which results from an agreement under § 21.29 whereby two or more applicants entitled to comparative consideration of their applications join in one (or more) of the existing applications and request dismissal of their other application (or applications) to avoid the delay and cost of comparative consideration, *unless* the amendment is for one (or more) pending Multipoint Distribution Service application (or applications) in which event the application (or applications) will be dismissed;

* * * * *

10. 47 C.F.R. § 21.33 is amended by revising it to read as follows:

§ 21.33 Grants by random selection.

(a) If an application for an authorization in the Digital Electronic Message Service (DEMS) is mutually exclusive with another such application and satisfies the requirements of Section 21.31 of this Part, the applicant may be included in the random selection process set forth in Part 1, Sections 1.821, 1.822 and 1.825.

(b) If an application for an authorization for a Multichannel Multipoint Distribution Service (MMDS) station or for a Multipoint Distribution Service (MDS) H-channel station is mutually exclusive with another such application, and satisfies the requirements ofh)1Sections 21.31 and 21.914 of this Part, the applicant may be included in the random selection process set forth in Part 1, Sections 1.821, 1.822 and 1.824.

(c) Renewal applications shall not be included in a random selection process.

(d) If Multipoint Distribution Service applicants enter into settlements, the applicants in the settlement must be represented by one application only and will not receive the cumulative number of chances in the random selection process that the individual applicants would have had if no settlement had been reached.

11. 47 C.F.R. § 21.39 is amended by redesignating paragraphs (a) and (b) and (c) as paragraphs (b) and (c) and (d) respectively, and by adding a new paragraph (a) to read as follows:

§ 21.39 Considerations involving transfer or assignment applications.

(a) A Multipoint Distribution Service conditional license may not be assigned or transferred prior to the completion of construction of the facility and the timely filing of the certification of completion of construction. However, consent to the assignment or transfer of control of a Multipoint Distribution Service conditional license may be given prior to the completion of construction and the timely filing of the certification of completion of construction where:

(1) The assignment or transfer does not involve a substantial change in ownership or control of the authorized Multipoint Distribution Service facilities; or

(2) The assignment or transfer of control is involuntary due to the licensee's bankruptcy, death, or legal disability.

* * * * *

12. 47 C.F.R. § 21.901(d)(2) is removed and reserved.

13. 47 C.F.R. § 21.901 is amended by removing paragraph (f)(1) and redesignating paragraph (f)(2) as paragraph (f).

14. 47 C.F.R. § 21.902 is amended by revising paragraphs (c)(1) and (c)(2) to read as follows:

§ 21.902 Frequency Interference.

* * * * *

(c) The following interference studies, as appropriate, must be filed initially with each application proposing a new transmitter site:

(1) An analysis of the potential for harmful interference with any authorized or previously-proposed, cochannel and adjacent-channel, station(s):

(i) If the coordinates of the applicant's proposed transmitter are within 100 miles (160.94 km) of the coordinates of any authorized or previously-proposed, cochannel or adjacent-channel, station(s); or

(ii) If the great circle path between the applicant's proposed transmitter and the protected service area of any authorized or previously-proposed, cochannel or adjacent-channel, station(s) is within 150 miles (241.41 km) or less and 90 percent or more of the path is over water, or within 10 miles (16.1 km) of the coast or shoreline of the Atlantic Ocean, the Pacific Ocean, the Gulf of Mexico, any of the Great Lakes, or any bay associated with any of the above (*see* Secs. 21.701(a), 21.901(a) and 74.902 of this chapter);

(2)(i) One map, folded to an 8 1/2 by 11 inch size, identifying the boundaries of the protected service areas of each authorized or previously-proposed, co-channel station with transmitter site coordinates within 100 miles (160.94 km) of the coordinates of the applicant's proposed transmitter site, and the 45 dB desired signal to undesired signal contour line of the applicant's proposed MDS station for cochannel stations; and

(ii) A second map, folded to an 8 1/2 by 11 inch size, identifying the boundaries of the protected service areas of each authorized or previously-proposed, adjacent-channel station with transmitter site coordinates within 100 miles (160.94 km) of the coordinates of the applicant's proposed transmitter site, and the 0 dB desired signal to undesired signal contour line of the applicant's proposed MDS station for adjacent-channel stations (*see* 47 C.F.R. § 21.902(d));

* * * * *

15. 47 C.F.R. § 21.913 is amended by removing paragraph (g)(11) and by revising paragraphs (g), (g)(1), (g)(2), (g)(3), (g)(4), (g)(5), (g)(6), (g)(7), (g)(8), (g)(9), and (g)(10) to read as follows:

§ 21.913 Signal Booster Stations.

* * * * *

(g) An MDS or ITFS licensee may install and commence operation of a signal booster station that has a maximum power level of -9 dBW EIRP and that does not extend service beyond the boundaries of an MDS station's protected service area or beyond an ITFS licensee's registered receive site, subject to the condition that for sixty (60) days after installation, no objection or petition to deny is filed by an authorized co-channel or adjacent channel ITFS or MDS station with a transmitter within 5 miles (8.05 km) of the coordinates of the primary transmitter of the signal booster. An MDS or ITFS licensee seeking to install a signal booster under this Section must, within 48 hours after installation, submit a certification that:

(1) The maximum power level of the signal booster transmitter does not exceed -9 dBW EIRP;

(2) A description of the signal booster technical specifications (including antenna gain and azimuth), the coordinates of the booster and receivers, and the street address of the signal booster;

(3) No registered receiver of an ITFS E or F channel station, constructed prior to May 26, 1983, is located within a 1 mile (1.61 km) radius of the coordinates of the booster, or in the alternative, that a consent statement has been obtained from the affected ITFS licensee;

(4) No environmental assessment location as defined at § 1.1307 of this chapter is affected by installation and/or operation of the signal booster;

(5) Each MDS and/or ITFS station licensee with protected service areas or registered receivers within a 5 mile (8.05 km) radius of the coordinates of the booster has been given notice of its installation;

(6) Consent has been obtained from each MDS or ITFS station licensee whose signal is repeated by the signal booster;

(7) The signal booster site is within the protected service area of the MDS station, if the signal of an MDS station is repeated;

(8) The power flux density at the edge of the MDS station's protected service area does not exceed -75.6 dBW/m2, if the signal of an MDS station is repeated;

(9) The antenna structure will extend less than 6.10 meters (20 feet) above the ground or natural formation or less than 6.10 meters (20 feet) above an existing manmade structure (other than an antenna structure); and

(10) The MDS or ITFS licensee understands and agrees that in the event harmful interference is claimed by the filing of an objection or petition to deny, the licensee must terminate operation within two (2) hours of written notification by the Commission, and must not recommence operation until receipt of written authorization to do so by the Commission.

16. 47 C.F.R. § 21.915 is added to read as follows:

§ 21.915 One-to-a-market requirement.

Each applicant may file only a single Multipoint Distribution Service application for the same channel or channel group in each area. The stockholders, partners, owners, trustees, beneficiaries, officers, directors, or any other person or entity holding, directly or indirectly, any interest in one applicant or application for an area and channel or channel group, must not have any interest, directly or indirectly, in another applicant or application for that same area and channel or channel group.

PART 74 -- EXPERIMENTAL, AUXILIARY, AND SPECIAL BROADCAST AND OTHER PROGRAM DISTRIBUTIONAL SERVICES

17. The authority citation for 47 C.F.R. Part 74 continues to read as follows: AUTHORITY: Secs. 4, 303, 48 Stat. 1066, as amended, 1082, as amended; 47 U.S.C. §§ 154, 303, unless otherwise noted.

18. 47 C.F.R. § 74.985 is amended by removing paragraph (g)(11) and by revising paragraphs (g), (g)(1), (g)(2), (g)(3), (g)(4), (g)(5), (g)(6), (g)(7), (g)(8), (g)(9), and (g)(10) to read as follows:

§ 74.985 Signal Booster Stations.

* * * * *

(g) An MDS or ITFS licensee may install and commence operation of a signal booster station that has a maximum power level of -9 dBW EIRP and that does not extend service beyond the boundaries of an MDS station's protected service area or beyond an ITFS licensee's registered receive site, subject to the condition that for sixty (60) days

after installation, no objection or petition to deny is filed by an authorized co-channel or adjacent channel ITFS or MDS station with a transmitter within 5 miles (8.05 km) of the coordinates of the primary transmitter of the signal booster. An MDS or ITFS licensee seeking to install a signal booster under this rule must, within 48 hours after installation, submit a certification that:

(1) The maximum power level of the signal booster transmitter does not exceed -9 dBW EIRP;

(2) A description of the signal booster technical specifications (including antenna gain and azimuth), the coordinates of the booster and receivers, and the street address of the signal booster;

(3) No registered receiver of an ITFS E or F channel station, constructed prior to May 26, 1983, is located within a 1 mile (1.61 km) radius of the coordinates of the booster, or in the alternative, that a consent statement has been obtained from the affected ITFS licensee;

(4) No environmental assessment location as defined at § 1.1307 of this chapter is affected by installation and/or operation of the signal booster;

(5) Each MDS and/or ITFS station licensee with protected service areas or registered receivers within a 5 mile (8.05 km) radius of the coordinates of the booster has been given notice of its installation;

(6) Consent has been obtained from each MDS or ITFS station licensee whose signal is repeated by the signal booster;

(7) The signal booster site is within the protected service area of the MDS station, if the signal of an MDS station is repeated;

(8) The power flux density at the edge of the MDS station's protected service area does not exceed -75.6 dBW/m2, if the signal of an MDS station is repeated;

(9) The antenna structure will extend less than 6.10 meters (20 feet) above the ground or natural formation or less than 6.10 meters (20 feet) above an existing manmade structure (other than an antenna structure); and

(10) The MDS or ITFS licensee understands and agrees that in the event harmful interference is claimed by the filing of an objection or petition to deny, the licensee must terminate operation within two (2) hours of written notification by the Commission, and must not recommence operation until receipt of written authorization to do so by the Commission.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 91-72

In the Matter of

Amendment of Part 90 of the Commission's Rules to Create the Emergency Medical Radio Service — RM-7336

REPORT AND ORDER

Adopted: January 14, 1993; Released: February 12, 1993

By the Commission:

I. INTRODUCTION

1. This *Report and Order* amends Part 90 of our Rules to establish the Emergency Medical Radio Service (EMRS) as a new Public Safety Radio Service under Subpart B of Part 90 of our Rules. Eligibility in the EMRS will be limited to persons or entities engaged in the provision of basic or advanced life support. We are assigning certain frequencies, primarily from the Special Emergency Radio Service (SERS), to the EMRS. The creation of the Emergency Medical Radio Service should improve the communications capabilities of entities providing life support activities and thus serve the public interest.

II. BACKGROUND

2. *Emergency medical communications.* Emergency medical service (EMS) communications are those relating to the actual delivery of emergency medical treatment including (a) transmissions between rescuers at the scene of an accident or disaster and physicians at a hospital, and (b) the dispatch of emergency medical providers transporting injured persons to hospitals and trauma centers.[1] Currently, EMS providers are encompassed in the broader category of "medical services,"[2] within the Special Emergency Radio Service (SERS).[3]

3. *Notice of Proposed Rule Making.* On March 20, 1991, we adopted a *Notice of Proposed Rule Making* (*Notice*)[4] that proposed to create the EMRS category.[5] Our objectives were to replace the current fragmented structure of EMS communications with a comprehensive, unified scheme and to provide for the effective and efficient use of EMRS spectrum. This was in keeping with Congress' desire that we establish a plan to ensure that the spectrum needs of entities providing emergency medical care are provided for in the management of radio spectrum.[6] Thus, we proposed to (a) place the EMRS in Subpart B of Part 90 of our Rules; (b) limit eligibility in that service so the number of users will be kept to a minimum, thus limiting the problems attendant with overcrowding; (c) reassign for the use of EMRS licensees various SERS frequencies, as well as ten paired 220 MHz narrowband frequencies; and (d) designate the International Municipal Signal Association and the International Association of Fire Chiefs, Inc. (IMSA/IAFC) as the certified coordinator for the EMRS.[7] Fifty-nine comments and eight reply comments were filed in response to the *Notice*.[8]

III. DISCUSSION

The Establishment of the EMRS

4. *Proposal.* The *Notice* indicated our concern that the number of EMS transmissions conducted on SERS channels had grown to such an extent that measures were necessary to protect EMS communications.[9] Therefore, we proposed to establish the EMRS as a step toward improving the reliability of EMS transmissions.[10]

5. *Comments.* Commenters unanimously support the establishment of a new EMRS category because of the potentially adverse consequences on public health and safety resulting from crowding on EMS channels.[11] According to IMSA/IAFC, there has been a 245 percent increase in the

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[1] *See, e.g.*, Report and Order, Docket No. 19880, 47 FCC 2d 676, 678 (1974). *See also* Report and Order, PR Docket No. 87-312, 2 FCC Rcd 3677 (1988); and 47 C.F.R. §§ 90.53(a), (b)(19).

[2] A wide variety of disparate entities are eligible for licensing under the medical services category. These include, among other: hospitals ambulance services, physicians, schools of medicine, and governmental entities. *See* 47 C.F.R. § 90.35.

[3] SERS frequencies are shared by the following ten categories of eligible users: medical services, rescue organizations, veterinarians, handicapped persons, disaster relief organizations, school buses, beach patrols, establishments in isolated places, communications stand-by facilities and emergency repair of public communications. Depending on the nature of the entity, EMS providers also may be eligible in other services such as the Fire Radio Service.

[4] Notice of Proposed Rule Making, PR Docket No. 91-72, 6 FCC Rcd 2017 (1991).

[5] *Notice* at 2018.

[6] 135 Cong. Rec. S259 (daily ed. January 25, 1989) (statement of Sen. Cranston).

[7] *Notice* at 2021.

[8] The *Notice* established June 6, 1991, and June 21, 1991, as the filing dates for comments and replies, respectively. *See* Appendix B for a list of parties filing comments and replies.

[9] *Notice* at 2018.

[10] *See* note 5, *supra*.

[11] *See, e.g.*, IMSA/IAFC Comments at 5, National Association of Business and Educational Radio, Inc.(NABER) Comments at 3, the Special Industrial Radio Service Association, Inc. (SIRSA) Comments at 3, Associated Public-Safety Communications Officers, Inc. (APCO) Comments at 1, Association of Air Medical Services (AAMS) Comments at 1, the National Association of State Emergency Medical Services Directors (NASEMSD) Comments at 1, the California Emergency Medical Services Authority (California) Comments at 1, the Florida Department of General Services (Florida) Comments at 1, the New Mexico Department of Health (New Mexico) Comments at 1, the Vir-

demand for EMS channels nationwide.[12] Commenters also agree that the most appropriate placement of EMRS is in Subpart B of Part 90 of our Rules.[13] They submit that EMS communications should have the same consideration as other public safety entities, such as fire and law enforcement, because these communications provide a vital public safety function.[14]

6. *Discussion.* The record in this proceeding supports the establishment of the EMRS to protect emergency medical communications. These transmissions are vital to the public interest. A discrete radio service category dedicated solely to transmissions related to life support will help to enhance the reliability of EMS communications. Communications transmitted by Public Safety Radio Service licensees, too, relate to the protection and safety of life. We are therefore placing the EMRS in Subpart B rather than in the Special Emergency Radio Service (Subpart C of Part 90), which governs a broad range of communications not necessarily of this critical nature. Also, by placing the EMRS in Subpart B, its licensees will have access to 19 UHF frequency pairs on a shared basis with other Public Safety Radio Service licensees. This will provide an additional source of spectrum to help alleviate congestion.[15]

7. We recently adopted a *Notice of Proposed Rule Making (Notice)*[16] to consolidate the current 19 radio services of Part 90 of the Rules into three broad categories (Public Safety, Non-Commercial and Specialized Mobile Radio) and a General Category pool encompassing all three services.[17] If this consolidation is effectuated, the EMRS service category may no longer exist. The spectrum allocated for EMRS use would remain in the Public Safety category, however, thus providing greater channel availability to emergency medical radio licensees.[18]

Eligibility Criteria for EMRS

8. *Proposal.* Our objective in proposing an eligibility restriction for the EMRS was to keep the number of users to a minimum, thus limiting frequency congestion. Specifically, we proposed to limit eligibility in the EMRS to persons or entities that provide basic or advanced life support services on an ongoing basis for the transmission of communications essential to the delivery of emergency medical services. Also, we proposed to require applications for licensing in the EMRS submitted by persons or organizations other than governmental entities to be accompanied by a statement prepared by the governmental body having legal jurisdiction over the area to be served indicating that the applicant is included in the state's emergency plan or otherwise supporting the application.[19]

9. Additionally, we proposed to permit EMRS entities to retain their eligibility in the SERS because many entities engaged in providing emergency medical care are also responsible for services requiring the use of SERS frequencies or must be able to interface directly with other entities having this responsibility. We also recognized that eligible users in the EMRS will likely have non-emergency communications needs, such as those pertaining to administrative purposes, that must be satisfied on spectrum other than that assigned to the EMRS. These non-emergency communications are currently permitted on SERS spectrum, and, therefore, we proposed to continue to permit EMRS eligibles to use SERS frequencies.[20]

10. *Comments.* Most commenters support our proposal to limit eligibility in the EMRS to persons or entities engaged in the provision of basic or advanced life support services.[21] They submit that a properly tailored eligibility restriction is a crucial element of an effective EMRS.[22] Certain commenters find our eligibility criteria too broad, however, and seek to narrow the criteria through a more specific limitation on an eligible sunderlying activity.[23] On the other hand, a few commenters find the proposed criteria too narrow and suggest expanding eligibility to include medical paging services.[24] Concerned about appropriate governmental approval of EMRS applications by non-governmental entities, Florida suggests mandating approval by the governmental body having jurisdiction over the state's emergency medical service plans rather than simply by the body having jurisdiction over the geographic area to be served.[25]

11. Almost all commenters support the proposal that EMRS eligibles also retain eligibility in SERS.[26] They submit that SERS frequencies are usually included in communications plans and designated for specific functions such as local dispatch frequencies, regional or statewide mutual

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ginia Department of Health (Virginia) Comments at 2, City of San Francisco (San Francisco) at 1, Texas Hospital Association (Texas) Comments at 1, MEDIC IV (MEDIC) Comments at 1, and Gibson County Ambulance Authority (Gibson) Comments at 1. Although ProNet, Inc. (ProNet) supports creation of the EMRS as a positive step in improving the quality and efficiency of EMS communications, it does not agree that EMS channels are congested. ProNet Reply Comments at 12.

[12] IMSA/IAFC Comments at 4.

[13] SIRSA Comments at 3, San Francisco Comments at 1, The Massachusetts Department of Public Health (Massachusetts) Comments at 1, The County of Los Angeles (Los Angeles) Comments at 1, NASEMSD Comments at 2, The Emergency Medical Services Authority (EMSA) Comments at 1, National Ski Patrol (NSP) Comments at 2, and Florida Comments at 1.

[14] *Id.*

[15] These UHF frequencies are from 453.050 to 453.950 MHz and from 458.050 to 458.950 MHz. *See,* for example, 47 C.F.R. §§ 90.17(c)(12), 90.19(e)(16), and 90.21(c)(7).

[16] *See Notice,* PR Docket No. 92-235, 7 FCC Rcd 8105 (1992).

[17] These categories would comprise a new Part 88. *Id.* at para. 1.

[18] We also proposed a set of spectrum efficiency standards based on narrowband technology to increase channel capacity of the private land mobile radio frequencies. *Id.* at paras. 7-8.

[19] *Notice* at 2019.

[20] *Id.*

[21] *See e.g.,* APCO Comments at 2, State of Florida (Florida) Comments at 2, State of California (California) Comments at 2, and MEDIC Comments at 1.

[22] APCO Comments at 2.

[23] Some suggestions include limiting eligibility to entities that provide direct, pre-hospital patient emergency medical care on an ongoing basis. *See* Tennessee Department of Health and Environment (Tennessee) Comments at 2. Also, APCO recommends including the phrase "whose primary business is" in the eligibility definition. *See* APCO Comments at 2.

[24] HCS Comments at 4, Los Angeles Department of Health Comments at 4, and ProNet Comments at 22.

[25] Florida Comments at 2.

[26] *See e.g.,* APCO Comments at 2, San Francisco Comments at 1, Florida Comments at 1, EMSA Comments at 1, Ski Patrol Comments at 2, State of Virginia (Virginia) Comments at 4, and Massachusetts Comments at 1.

aid channels, and emergency inter-hospital frequencies.[27] Commenters assert that removing EMRS licensees from holding SERS licenses would be counterproductive and could interfere with their capability to perform vital services.[28] Only NABER opposes retention of SERS eligibility for EMRS licensees, asserting that the communications needs of SERS users demand reciprocity of treatment.[29]

12. *Discussion.* Our objective in this proceeding is to establish the EMRS to improve the communications capabilities of entities engaged in providing life support activities. Only by limiting eligibility in this service can the number of users be kept to a minimum thus diminishing the problems currently caused by congestion of this spectrum. The record completely supports this view. Our proposed language limits eligibility while not excluding entities serving a crucial public need. Excluding from EMRS eligibility those who routinely provide emergency medical care because their services may not be considered their primary business would be counterproductive and injurious to the public interest. Further, under the proposed eligibility criteria, only those entities engaged in the provision of basic or advanced life support *on an ongoing basis* will be eligible for the EMRS and thus those entities engaged only tangentially in the provision of emergency medical care will be excluded from EMRS eligibility. It is our opinion that this restriction is sufficient to limit congestion on EMRS channels.

13. We are rejecting the suggestion to include as EMRS eligibles all who provide emergency medical care whether or not the care is necessary to sustain the continuation of life. This would only perpetuate congestion on the affected channels. Therefore, we adopt the eligibility criteria as proposed. Persons or entities engaged in the provision of basic or advanced life support services on an ongoing basis are eligible to hold authorizations in the Emergency Medical Radio Service to operate stations for transmission of communications essential for the delivery or rendition of emergency medical services to the extent that such services include the provision of basic or advanced life support.

14. We find, however, that Florida's comments have merit and, therefore, will modify our proposal concerning the support necessary to permit non-governmental entities to apply for EMRS frequencies.[30] Rather than requiring a statement of support by the governmental body having legal jurisdiction over the area to be served, we will require that support be provided by the governmental body or bodies having jurisdiction over the state or local emergency medical service plans. This will ensure that the governmental entities entrusted with the responsibility of meeting the region's emergency medical needs provide official verification of the appropriateness of an EMRS application filed by a non-governmental organization. This is crucial for the proper implementation of state, regional, and local emergency medical plans in those areas that have such plans. In addition, as there is general agreement that there is a need for continued eligibility of EMRS applicants for SERS licenses, we are making such provision.[31] EMRS entities need access to SERS channels forx interfacing with entities providing services through use of SERS channels, as well as for conducting non-emergency communications in furtherance of their emergency medical functions.[32]

The Reassignment of Frequencies to EMRS

15. *Proposal.* In the *Notice*, we proposed to reassign certain frequencies for use in the EMRS. We tentatively concluded that the SERS spectrum currently limited primarily for emergency medical communications is the most appropriate source of spectrum for the EMRS.[33] Therefore, we proposed to reassign to this new service category the ten paired UHF channels in the 460 MHz range known as the MED channels,[34] and five VHF simplex frequencies in the 155 MHz range.[35] Because of our proposed EMRS eligibility criteria, we proposed to remove certain restrictions

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[27] Virginia Comments at 4-5.

[28] NASEMSD Comments at 2.

[29] NABER Comments at 3.

[30] Florida Comments at 2.

[31] Consistent with our goal of limiting EMRS eligibility, we are denying SERS licensees (Subpart C of Part 90) access to EMRS spectrum (Subpart B of Part 90) through interservice sharing. (*See* Appendix A for amendments to § 90.176(a)). We will, however, permit sharing of frequencies allocated to the Public Safety Radio Services by the various separate services contained in Subpart B. This action will not overburden the EMRS frequencies because many of the EMRS channels have such specific use restrictions that if an applicant can satisfy these, it will be eligible in the EMRS in the first place.

[32] Currently, 47 C.F.R. § 90.176(b) provides that non-governmental entities eligible in the SERS and eligibles in the Industrial and Land Transportation Radio Services (I/LT) may apply to use any of the frequencies allocated to these services excluding those allocated to the SERS. Because emergency medical communications will no longer be primarily in the SERS service category, there is no continuing need to exempt SERS frequencies from interservice sharing. SIRSA supports our proposal in this regard. *See* SIRSA Comments at 5. We disagree with NABER that congestion considerations and the differing nature of SERS and I/LT communications make these two services incompatible for interservice sharing. *See* NABER Comments at 9-10. Reciprocal interservice sharing in this situation will permit more efficient use of the spectrum. In addition, the removal of most EMS providers from the SERS renders the government versus non-government distinction unnecessary. Therefore, we will now permit all SERS eligibles and I/LT eligibles to share each other's spectrum under the criteria of 47 C.F.R. § 90.176(b).

[33] *Notice* at 2019.

[34] The specific channel pairs forming MED channels 1 through 8 are 463.000/468.000, 463.025/468.025, 463.050/468.050, 463.075/468.075, 463.100/468.100, 463.125/468.125, 463.150/468.150, and 463.175/468.175 MHz. MED channels 9 and 10 are formed of the channel pairs 462.950/467.950 and 462.975/467.975 MHz.

[35] These five VHF simplex frequencies are as follows: 155.325, 155.340, 155.355, 155.385 and 155.400 MHz.

currently applicable to these frequencies.[36] Additionally, we proposed prohibiting interservice sharing on these channels.[37]

16. Because additional spectrum is needed for the EMRS, we also proposed the reassignment of the SERS frequencies 453.025/.075/.125 and .175 MHz and 458.025/.075/.125 and .175 MHz used on an interservice sharing basis.[38] We tentatively concluded that this would result in the least disruption to the remaining non-EMRS SERS entities and would be particularly appropriate for EMRS use because it will create four new full capacity UHF paired channels.[39] Also, these channel pairs are in the same band as the MED channels, making them compatible with existing multichannel mobile equipment. We noted that this compatibility would promote system expansion and enable existing mutual aid assignments to be retained.[40]

17. While recognizing ProNet's concerns regarding the proposed reassignment of the 453.025/.075/.125/.175 MHz frequencies, which are currently restricted to one-way paging operations for entities eligible in the medical services category of the SERS, we indicated that the need for satisfying the communications demands of entities engaged in life saving activities is of paramount concern.[41] Because the proposed use of these frequencies in the EMRS for two-way voice and telemetry communications is not compatible with the current paging operations, we proposed to grandfather existing one-way paging operations on these frequencies only for a period of five years after the date of the adoption of the proposals raised in the *Notice*.[42] We also proposed that the low power portable transmitters currently operating on the 458 MHz SERS frequencies may be accommodated on the 12.5 kHz frequency offset channels in the 450 MHz band pursuant to 47 C.F.R. § 90.267.[43]

18. We also proposed to assign the low power SERS frequencies 150.775 MHz and 150.790 MHz exclusively to the EMRS for full power use without restriction -- other than the EMRS eligibility criteria.[44] In addition, we proposed to reassign channel pairs 460./465.525 and 460./465.550 MHz to the EMRS without restriction -- other than the proposed eligibility criteria -- because they are currently available for use only by governmental entities eligible in the medical services SERS category for the dispatch of medical care vehicles and personnel for the delivery of emergency medical services.[45] Finally, we proposed to assign five pairs of 220 MHz narrowband frequencies exclusively to the EMRS to serve as a resource to satisfy both immediate and future demands of EMRS licensees.[46] These frequency pairs are 220./221.9025, 220./221.9075, 220./221.9125, 220./221.9175, 220./221.9225 MHz.

19. *Comments.* Commenters generally support the proposed reassignment of the above-specified frequencies for use in the EMRS as providing a comprehensive scheme for emergency transmissions to replace the currently fragmented SERS system.[47] They submit that reallocation of these channels will enhance their use for emergency purposes as well as significantly increase their effective use.[48] Commenters further assert that because in some localities the ten MED channels have come to be used exclusively for regulated emergency medical service in accordance with local and state emergency plans, there would be no disruption in these jurisdictions.[49]

20. There is also support for removing certain restrictions on the 155 MHz channels no longer thought necessary,[50] while leaving our primary use restrictions intact.[51] Commenters favor the reassignment of the specified 220 MHz pairs to the EMRS as an indication of the Commis-

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[36] The restrictions proposed for elimination are (1) 47 C.F.R. § 90.53(b)(9), which currently restricts assignment of the channels 155.325, 155.355, 155.385 and 155.400 MHz to hospitals and ambulances; and (2) 47 C.F.R. 90.53(b)(10) which currently limits the authorized use of the frequency 155.340 MHz to the rendition and delivery of medical services. We proposed, however, to leave our existing primary use restrictions on the use of eight of the MED channels intact because our objectives of promoting efficiency, compatibility, and flexibility in use of these channels for emergency medical communications will continue to be served by the standards governing the use of these channels even if they are assigned to the EMRS. *Notice* at 2019-2020.

[37] *Notice* at 2019.

[38] These frequencies are shared with the Local Government Service in the Public Safety Radio Services for highway call box operation. *See* 47 C.F.R. § 90.53(b)(13); *see also* 47 C.F.R. § 90.17(b), (c)(11). We adopt our proposal to grandfather existing highway call box operations licensed on these frequencies indefinitely.

[39] *Notice* at 2020.

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.* Under our existing rules, the 458 MHz frequencies are limited to use by licensees in the medical services category for telemetry or voice transmissions with a maximum output power of 1 watt from a portable telemetering unit to a mobile repeater in an ambulance for automatic retransmission to a hospital or other medical care facility. *See* 47 C.F.R. § 90.53(b)(13).

[44] *Notice* at 2021. Currently, there is a 2.5 watt power limitation on the use of these frequencies. Also, the use of these frequencies is currently limited to voice transmissions from a portable unit that is not airborne to an ambulance or other emergency vehicle for automatic retransmission on a regular mobile frequency to a base station facility. *See* 47 C.F.R. § 90.53(b)(7).

[45] *Notice* at 2021. *See* 47 C.F.R. § 90.53(b)(34). These frequency pairs are currently subject to interservice sharing with the Police and Fire Radio Services. *See* 47 C.F.R. § 90.53(b)(17). No change was proposed.

[46] *Notice* at 2021.

[47] *See, e.g.*, NASEMSD Comments at 4-5, IMSA/IAFC Comments at 4, SIRSA Comments 4-6, and APCO Comments at 4-8.

[48] *See, e.g.*, Florida Comments at 3, and APCO Comments at 4.

[49] Florida Comments at 2.

[50] In view of the significant investments made by some local and regional authorities in non-EMS systems, IMSA/IAFC suggests use of our waiver procedure where the circumstances demonstrate that the local population's overall emergency and emergency medical needs would be served best by preserving the existing uses of the 155 MHz frequencies. IMSA/IAFC Reply Comments at 7.

[51] Commenters supported the elimination of the restrictions in 47 C.F.R. § 90.53(b)(9) limiting assignment of channels 155.325, 155.355, 155.385 and 155.400 MHz to hospitals and ambulances, and the restriction in 47 C.F.R. § 90.53(b)(10) limiting the use of 155.340 MHz to the rendition and delivery of medical services. *See, e.g., Florida Comments at 3. Commenters also supported our proposal to retain the primary use restrictions, e.g.,* retaining the limitation in 47 C.F.R. § 90.53(b)(20) restricting the primary use of MED channels 4, 5, 6, 7, and 8 to communications between medical facilities vehicles and personnel related to medical supervision and instruction for the treatment and transport of patients in the rendition or delivery of medical services. *See* Alaska Comments at 1. A few commenters, how-

sion's foresight in providing for future needs.[52] They recommend, however, that the 220 MHz EMRS channels, unlike the other frequencies in this band,[53] be subject to frequency coordination.[54]

21. The 453 MHz assignment is the only frequency reassignment proposal that raises concerns with commenters. Most parties support the reassignment of the 453/458 MHz channels to the EMRS as full power pairs, submitting this action will greatly enhance the potential for expanding networks and relieving congestion.[55] A few commenters, however, such as ProNet and NABER, oppose reassignment of the 453 MHz channels.[56] Specifically, they assert that these frequencies, currently restricted to one-way paging operations, are heavily used and reassignment would cause local hospitals to expend millions of dollars in new equipment, new licenses and reprogrammed radios.[57] ProNet further contends that the economic burdens the Commission's proposal will place on healthcare institutions will be particularly harsh if the proposed five-year grandfathering period is adopted. It submits that five years is inadequate to amortize the capital costs on hospitals' equipment and replacement costs.[58]

22. ProNet is particularly concerned that reassignment of the 453 MHz channels would force its wide area paging system operating on the frequency 453.125 MHz in the Chicago, Illinois metropolitan area to relocate its equipment and users at great cost.[59] It further contends that alternative frequencies, other SERS paging channels and the Business Radio Service paging-only frequencies, are even more crowded than the 453 MHz SERS paging frequencies.[60] comments, however, APCO asserts that much, if not all of the wide area medical paging could be accomplished through the use of the many existing commercial paging networks.[61] In regard to short range paging, APCO recognizes that while it may be costly and difficult to replace the short range systems in the 450 MHz band, it would not be impossible within the suggested time frame.[62] In response to ProNet's concerns, IMSA/IAFC in its reply comments supports a waiver procedure to deal with paging licensees currently operating on 453 MHz frequencies who want to continue their paging operations on these channels.[63]

23. *Discussion.* There is a clear consensus for the reallocation of all of the two-way channels proposed for EMRS use. Commenters agree that the SERS spectrum currently dedicated primarily to EMS transmissions is the most appropriate source of spectrum for the EMRS. Specifically, the ten MED channels and the five VHF simplex frequencies are suitable for EMRS use because they are currently designated for emergency medical communications and the current limitations on their use make their removal least disruptive to the remaining SERS licensees. In fact, commenters have indicated that in some instances, the ten MED channels are used exclusively for regulated emergency medical service in accordance with local and state plans despite their slightly broader use and eligibility restrictions.[64] Therefore, in these situations there would be no disruption to EMS operations because the current MED channel users are already EMRS facilities.

24. In those localities where non-EMRS medical services -- those not providing basic or advanced life support services on an ongoing basis -- are operating on the MED channels, there is other adequate SERS spectrum available for use. Removing EMS communications from the SERS category will help to alleviate congestion on the channels remaining in the SERS category. Thus, we are removing references to the ten MED and five VHF simplex frequencies from the SERS category and reallocating them to the EMRS.[65] Because the narrow EMRS eligibility and use criteria removes the necessity for several of the restrictions currently applicable to these frequencies, such as restricting the use of certain of the 155 MHz channels to hospitals and ambulance companies in communication with hospitals, we are also removing these restrictions.[66]

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ever, consider the biomedical telemetry limitation on MED channels 1, 2, and 3 as unnecessary because biomedical telemetry is virtually obsolete in some jurisdictions. *See, e.g.,* Florida Comments at 3.

[52] *See, e.g.,* Alaska Comments at 1, and Florida Comments at 4.

[53] Applications for licenses in the 220-222 MHz band are granted on a first-come first-serve basis. *See Report and Order,* PR Docket No. 89-552, 6 FCC Rcd 2356, 2357 (1991).

[54] MEDIC Comments at 1, and Florida Comments at 4.

[55] NASEMSD Comments at 4, Florida Comments at 2, APCO Comments at 5, and IMSA/IAFC Comments at 4.

[56] NABER Comments at 5, and ProNet Comments at 3. Ericsson Corporation (Ericsson) and the Healthcare Information and Management Systems Society of the American Hospital Association (AHA) also oppose reassignment of the 453 MHz frequencies. Ericsson Reply Comments at 2, and AHA Reply Comments at 1.

[57] NABER Comments at 5, ProNet Comments at 3, and Ericsson Reply Comments at 2.

[58] ProNet Reply Comments at 9.

[59] ProNet Comments at 3. HCS, operating on 453.125 MHz in Chicago, Illinois, indicates concern that the EMRS eligibility criteria will prevent its continued operation on this channel. Commenter asserts that there are no remaining SERS paging-only frequencies suitable for wide-area paging that will be able to accommodate a system of its size. *See* HCS Comments at 2-3.

[60] ProNet Comments at 4. In its reply comments, ProNet asserts that of the seven non-453 MHz SERS paging-only channels, only two are feasible for wide area paging operations. It also submits that in the Chicago market those channels are too heavily loaded to accommodate the HCS system, much less all other 453 MHz users. *See* ProNet Reply Comments at 7. Further, ProNet asserts that the present use of EMS-designated spectrum in the Chicago area is extremely low. ProNet Reply Comments at 10.

[61] APCO Reply Comments at 2.

[62] APCO Reply Comments at 3.

[63] IMSA/IAFC Reply Comments at 8-9. Most commenters support the five-year grandfathering period as sufficient to permit affected entities to relocate their 453 MHz paging operations. *See e.g.,* Florida Comments at 3, and Texas Hospital Association (THA) Comments at 1. ProNet submits that rather than a wholesale, nationwide reallocation of the 453 MHz channels that may not benefit EMS in several geographic areas, a market-by-market approach should be adopted to enable the Commission to determine if and where spectrum should be allocated. ProNet Comments at 19. In the alternative, ProNet suggests that these paging operations be permanently grandfathered. ProNet Comments at 20. HCS also recommends permanent grandfathering rights, either nationwide or, at a minimum, in the Chicago area. HCS Comments at 4.

[64] Florida Comments at 2.

[65] This action necessitates the amendment of 47 C.F.R. § 90.53(b). *See* Appendix A for amendments to the Rules.

[66] *See* note 36, *supra.* There is a consensus for taking this action. *See* note 51, *supra.* Additionally, we are leaving our existing primary use restrictions on the MED channels intact

25. There is substantial support in the record for reassigning SERS frequencies in the 453 and 458 MHz band to the EMRS. The need for a comprehensive scheme for emergency medical communications requires the reallocation of frequencies, including the 453 MHz channels. Although we recognize that there will be economic costs incurred to relocate medical paging systems, they are unavoidable. We are particularly sensitive to the need for protecting life saving communications from the use of SERS frequencies for less crucial purposes. In certain situations, however, an accommodation may be warranted. If a licensee currently operating on a one-way paging channel demonstrates that there is adequate spectrum for EMS transmissions in its area of operation or that the relocation of its medical paging system would not serve the public interest because, for example, there is no reasonable alternative channel for its paging system,[67] or relocation would cause significant disruption of public safety communications, the licensee could request that its system be grandfathered through waiver on a80permanent basis.[68] Otherwise, licensees currently operating on these channels will only be permitted to operate on the 453 MHz and the 458 MHz channels for a period of five years from adoption of this Report and Order. This will ensure a sufficient transition period for relocating their operations to other SERS paging-only frequencies listed in 47 C.F.R. § 90.53(b).[69]

26. The record also supports reassigning the low power SERS frequencies 150.775 and 150.790 MHz to the EMRS for full power use.[70] Because these channels are currently limited to voice transmission from a portable (hand-held) unit that is not airborne to an ambulance or other emergency vehicle for automatic retransmission,[71] most existing licensees will meet the EMRS eligibility criteria. Therefore, reassignment of these channels to the EMRS should cause little dislocation. Further, because only licensees meeting the EMRS eligibility criteria will be able to use these channels, there will be no need to limit transmissions to this type of operation or to continue to impose the current power limitation.[72] Nor does it appear that raising the power limitation would cause harmful interference to users on adjacent channels. We are confident, as are commenters, that frequency coordination should minimize any potential for such interference.[73]

27. In addition, the 460./465.525 and 460./465.550 MHz frequency pairs will be reassigned because they too are suitable for EMRS use. These channels are currently available for use only by government entities eligible in the medical services SERS category for the dispatch of medical care vehicles and personnel for the delivery of emergency medical services. Virtually all entities currently eligible to use these channels will be eligible in the EMRS. Therefore, reassignment of these frequencies from SERS to EMRS is clearly warranted. The EMRS eligibility criteria will ensure that these frequencies are employed for the intended medical emergency situations thus serving the public's interests and needs.[74]

28. Finally, we are assigning five pairs of 220 MHz narrowband frequencies to the EMRS as a resource to meet both current and future needs. There is a clear consensus for this action.[75] We believe that assignment of all the above frequencies to the EMRS will help to redress the congestion existing on the SERS channels currently used essentially for EMS communications. Commenters suggest that we require EMRS applicants for 220 MHz frequencies to submit their requests to the designated certified coordinator,[76] rather than be processed through the first-come/first-served procedure for commercial use of the 220 MHz band.[77] Because the 220 MHz channels designated for EMRS use are assigned on an exclusive basis using station separation standards, however, there is no need for frequency coordination. Applications for these channels will be processed in the same manner as applications for other 220 MHz narrowband frequencies -- first-come/first-served.

29. Regarding commenters' concerns that applications for these narrowband frequencies be compatible with existing regional and local emergency medical plans, all requests for use of the 220-222 MHz EMRS channels will be subject to approval by appropriate emergency planning authorities as are applications for other EMRS frequencies.[78] The coordination process is not the appropriate vehicle to ensure this goal. We also note that while we are creating this new service and allocating these new frequencies to the service, EMRS licensees should strive to implement spectrally efficient systems and pursue technological innovation to meet the many demands placed on the EMRS channels. In the long term this will be the most effective means of reducing congestion and interference.

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because they remain needed. The EMRS eligibility criteria do not negate the continued importance of these limitations. Although there is some limited comment opposing the retention of certain restrictions, *e.g.*, the restriction limiting the primary use of the MED channels 1, 2, and 3 to biomedical telemetry, as no longer necessary (*See, e.g.*, IMSA/IAFC Reply Comments at 6), we conclude that retention of these standards will continue to promote efficiency and compatibility while permitting flexibility by authorizing both primary and secondary uses.

[67] Some commenters indicate that while the 453 MHz channels are needed in certain major cities as additional paramedic frequencies, there is no alternative spectrum in which to relocate the present paging systems. *See, e.g.*, Los Angeles Comments at 2.

[68] We shall address each situation upon request by existing licensees on a case-by-case basis.

[69] Adequate spectrum resources exist to absorb SERS licensees displaced from the reassignment of the 458 MHz frequencies. For example, low power portable transmitters currently operating on these channels may be accommodated on the 12.5 kHz frequency offset channels in the 450 MHz band pursuant to 47 C.F.R. § 90.267.

[70] APCO Comments at 6, and Tennessee Comments at 5.

[71] *See, e.g.*, 47 C.F.R. § 90.53(b)(7).

[72] There is some limited concern that removing the power restrictions on the 150 MHz channels would cause interference. *See* Virginia Comments at 5.

[73] Tennessee Comments at 5.

[74] These frequencies will continue to be shared with the Police and Fire Radio Services. *See* 47 C.F.R. § 90.53(b)(17).

[75] *See, e.g.*, Sierra-Sacramento Valley Emergency Medical Agency Comments at 1, and APCO Comments at 7.

[76] MEDIC Comments at 1, Massachusetts Comments at 2, Florida Comments at 4, and IMSA/IAFC comments at 7-8.

[77] *See* Report and Order in PR Docket No. 89-552, 6 FCC Rcd 2356, 2357 (1991).

[78] Where there is no local plan, in its application for a 220-222 MHz EMRS channel, the applicant should make an affirmative statement that no such plan is in existence.

30. On May 24, 1991, the Private Radio Bureau imposed a freeze on acceptance of applications for the 220-222 MHz band.[79] This action was taken to permit the Bureau to begin the sizable administrative task of processing the applications for the 220-222 MHz band and preparing for any necessary lotteries for applications in this band.[80] All 220-222 MHz frequencies, including Channels 181 through 185 being assigned to the EMRS, remain subject to the Bureau's freeze *Order*. At such time as we begin accepting applications for the 220-222 MHz band, EMRS eligibles may apply to operate on Channels 181 through 185.

Certified Frequency Coordinator for EMRS

31. *Proposal.* In the *Notice*, we repeatedly alluded to the need for the various entities eligible in the EMRS to coordinate their operations carefully to ensure the efficient and effective use of this spectrum.[81] Consequently, we proposed that IMSA/IAFC be designated as the certified coordinator for the EMRS because IMSA/IAFC was primarily responsible for the coordination of EMS communications in the SERS.[82] We also proposed that NABER and IMSA/IAFC remain the coordinators of SERS.

32. *Comments.* There is support for the proposed designation of IMSA/IAFC as the EMRS certified coordinator.[83] Some commenters, however, suggest that APCO be chosen as the certified coordinator for EMRS because APCO has local frequency advisors who have personal and localized knowledge of the use of radio spectrum in particular areas.[84] In response to these concerns, IMSA/IAFC notes that it regularly participates in state EMS director workshops to remain familiar with the particularities of each region's emergency medical operations.[85] Further, IMSA/IAFC submits that it is imperative that the same coordinator handle allpthe EMRS applications to ensure the careful and organized coordination of EMRS activities.[86] Several commenters also advocate that the EMRS coordinator be required to comply with state and local public safety plans.[87] Additionally, NABER requested that it be designated the sole coordinator of the remaining SERS frequencies.[88]

33. *Discussion.* We conclude that designating IMSA/IAFC as the certified coordinator for the EMRS will best serve the public interest.[89] IMSA/IAFC has had the primary responsibility for coordinating emergency medical communications in the SERS. Thus, it has the necessary experience to provide, on an immediate basis, the careful coordination of EMRS frequencies warranted by the nature of these transmissions. Although some commenters request that APCO be designated as the certified coordinator for these channels, APCO itself does not oppose the selection of IMSA/IAFC as the relevant coordinator.[90] As mentioned in the *Notice* and advocated by many commenters,[91] we expect IMSA/IAFC to verify that all applications are compatible with existing regional and local emergency medical plans. Finally, in view of their experience coordinating SERS frequencies, NABER and IMSA/IAFC both will remain the coordinators of the SERS.

IV. CONCLUSION

34. We have established a comprehensive regulatory scheme to better provide for the transmission of emergency medical communications. By creating the Emergency Medical Radio Service as a separate radio category with a significant number of frequencies assigned for use by eligible entities, the public safety community and therefore the public interest will be served. Our policies and rules emanating from this rule making proceeding will help to improve the quality and reliability of EMS communications. Our action also will promote efficient and effective operation on EMRS frequencies.

V. FINAL REGULATORY FLEXIBILITY ANALYSIS

35. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

Need and Purpose of the Action

36. By establishing a discrete Emergency Medical Radio Service, the Commission will improve the quality and reliability of EMS communications. This action will help to alleviate the congestion and interference currently hampering EMS communications by restricting use of the relevant channels and assigning additional spectrum for emergency medical communications.

Issues Raised in Response to the Initial Regulatory Flexibility Analysis

37. There were no comments submitted in response to the Initial Regulatory Flexibility Analysis.

Significant Alternatives Considered and Rejected

38. All significant alternatives have been addressed in this Report and Order.

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[79] Order, Acceptance of 220-222 MHz Private Land Mobile Applications, DA 91-647.

[80] *Id.* at 2.

[81] *Notice* at 2021.

[82] *Id.*

[83] *See, e.g.*, Virginia Comments at 10, and Sierra-Sacramento Valley Emergency Service Agency (SEMSA) Comments at 2. SEMSA submits that designation of IMSA/IAFC as the EMRS coordinator would be more efficient if APCO was the designated coordinator for those frequencies above 450 MHz. *Id.*

[84] Monmouth County Police Radio at 1, Sierra-Sacremento Valley Emergency Medical Agency Comments at 2, and Washington Department of Health Comments at 1.

[85] IMSA/IAFC Reply Comments at 13-14.

[86] IMSA/IAFC Reply Comments at 14.

[87] *See, e.g.*, NASEMSD Comments at 5, Virginia Comments at 10, and APCO Reply Comments at 4.

[88] NABER Reply Comments at 1.

[89] IMSA/IAFC will coordinate all EMRS frequencies with the exception of the 220 MHz channels because applications for these latter frequencies are not subject to frequency coordination procedures.

[90] APCO Comments at 8. APCO submits, however, that should IMSA/IAFC fail to arrive at suitable coordination procedures, it would be willing to serve as the certified coordinator for the EMRS. APCO Comments at 11.

[91] *Notice* at 2021. *See also supra* note 87.

VI. ORDERING CLAUSES

39. Accordingly, IT IS ORDERED that, pursuant to the authority of Sections 4(i), 303(r) and 332(a)(2) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r) and 332(a), Part 90 of the Commission's Rules, 47 C.F.R. Part 90, IS AMENDED as set forth in Appendix A below, effective [thirty days after publication in the Federal Register].

40. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

41. For further information concerning this Report and Order, contact Freda Lippert Thyden, Land Mobile and Microwave Division, Private Radio Bureau, (202) 634-2443.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Part 90 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 90 continues to read as follows:

AUTHORITY: Sections 4, 303, 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 154, 303, and 332, unless otherwise noted.

2. Section 90.27 is added in sequential order in Subpart B to read as follows:

§ 90.27 Emergency Medical Radio Service.

(a) *Eligibility.* Persons or entities engaged in the provision of basic or advanced life support services on an ongoing basis are eligible to hold authorizations in the Emergency Medical Radio Service to operate stations for transmission of communications essential for the delivery or rendition of emergency medical services for the provision of basic or advanced life support. Applications submitted by persons or organizations other than governmental entities must be accompanied by a statement prepared by the governmental body having jurisdiction over the state's emergency medical service plans indicating that the applicant is included in the state's emergency plan or otherwise supporting the application.

(b) *Frequencies available.* The following table indicates frequencies available for assignment to stations in the Emergency Medical Radio Service, together with the class of station(s) to which they are normally assigned and the specific assignment limitations explained in paragraph (c) of this section. (Frequencies below 450 MHz indicated for base or mobile stations may be authorized to fixed stations on a secondary basis to stations in the mobile service):

Emergency Medical Radio Service Frequency Table

Frequency or band	Class of station(s)	Limitations
Megahertz:		
72.00 to 76.00	Operational-fixed	1
150-170	Base or mobile	2
150.775	Mobile	
150.790	do	
155.325	Base or mobile	3,4
155.340	do	4,5
155.355	do	3,4
155.385	do	3,4
155.400	do	3,4
169-172	Mobile	6
220.9025	Base	25
220.9075	do	25
220.9125	do	25
220.9175	do	25
220.9225	do	25
221.9025	Mobile	25
221.9075	do	25
221.9125	do	25
221.9175	do	25
221.9225	do	25
450 to 470	Fixed	7
453.025	Base	9,19,22,26
453.050	Base or mobile	8
453.075	Base	9,19,22,26
453.100	Base or mobile	8
453.125	Base	9,19,22,26
453.150	Base or mobile	8
453.175	Base	9,19,22,26
453.200	Base or mobile	8
453.250	do	8
453.300	do	8
453.350	do	8
453.400	do	8
453.450	do	8
453.500	do	8
453.550	do	8
453.600	do	8
453.650	do	8
453.700	do	8
453.750	do	8
453.800	do	8
453.850	do	8
453.900	do	8
453.950	do	8
458.025	Mobile	9,22,26
458.050	do	8
458.075	do	9,22,26
458.100	do	8
458.125	do	9,22,26
458.150	do	8
458.175	do	9,22,26
458.200	do	8
458.250	do	8
458.300	do	8
458.350	do	8
458.400	do	8
458.450	do	8
458.500	do	8
458.550	do	8
458.600	do	8
458.650	do	8
458.700	do	8
458.750	do	8
458.800	do	8
458.850	do	8
458.900	do	8
458.950	do	8
460.525	Base or Mobile	10
460.550	do	10
462.950	do	3,11,12
462.975	do	3,11,12
463.000	do	9,13,20
463.025	do	9,13,20
463.050	do	9,13,20
463.075	do	9,13,21
463.100	do	9,13,21

463.125	do	9,13,21
463.150	do	9,13,21
463.175	do	9,13,21
465.525	Mobile	10
465.550	do	10
467.950	do	3,11,12
467.975	do	3,11,12
468.000	do	9,13,20
468.025	do	9,13,20
468.050	do	9,13,20
468.075	do	9,13,21
468.100	do	9,13,21
468.125	do	9,13,21
468.150	do	9,13,21
468.175	do	9,13,21
470 to 512	Base or Mobile	14
806 to 824	Mobile	15
851 to 869	Base or Mobile	15
928 and above	Operational-fixed	16
929 to 930	Base only	24
1427 to 1435	Operational-fixed base or mobile	17
2450 to 2500	Base or Mobile	18
10,550 to 10,680	do	23

(c) Explanation of assignment limitations appearing in the frequency table of paragraph (b) of this section:

(1) The frequencies available for use at operational-fixed stations in the band 72-76 MHz are listed in § 90.257(a)(1). These frequencies are shared with other services and are available only in accordance with the provisions of § 90.257 of this part.

(2) Rules concerning the use of this band for narrowband operations are set forth in § 90.271 of this part.

(3) A licensee regularly conducting two-way communications operations on this frequency may, on a secondary basis, also transmit one-way alert-paging signals to ambulance and rescue squad personnel.

(4) In addition to other authorized uses, the use of F1B, F1D, F2B or F2D emission is permitted on this frequency for the operation of bio-medical telemetry systems except in the following geographic locations:

(i) New York, N.Y.-Northeastern New Jersey; Los Angeles-Long Beach, Calif.; Chicago, Ill.-Northwestern Indiana; Philadelphia, Pa.-N.J.; Detroit, Mich.; San Francisco-Oakland, Calif.; Boston, Mass.; Washington, D.C.-Md.-Va.; Cleveland, Ohio; St. Louis, Mo.-Ill.; Pittsburgh, Pa.; Pittsburgh, Pa.; Minneapolis-St. Paul, Minn.; Houston, Tex.; Baltimore, Md.; Dallas, Tex.; Milwaukee, Wis.; Seattle-Everett, Wash.; Miami, Fla.; San Diego, Calif.; Atlanta, Ga.; Cincinnati, Ohio-Ky.; Kansas City, Mo.-Kans.; Buffalo, N.Y.; Denver, Colo.; San Jose, Calif.; New Orleans, La.; Phoenix, Ariz.; Portland, Oreg.-Wash.; Indianapolis, Ind.; Providence-Pawtucket-Warwick, R.I.-Mass.; Columbus, Ohio; San Antonio, Tex.; Louisville, Ky.-Ind.; Dayton, Ohio; Fort Worth, Tex.; Norfolk-Portsmouth, Va.; Memphis, Tenn.-Miss.; Sacramento, Calif.; Fort Lauderdale-Hollywood, Fla.; Rochester, N.Y.; Tampa-St. Petersburg, Fla.

(ii) The continuous carrier mode of operation may be used for telemetry transmissions on this frequency for periods up to two-minutes duration; following which there must be a break in the carrier for at least a one-minute period.

(iii) Geographical coordinates for the above-listed urbanized areas may be found at Table 1 of § 90.635 of this part.

(5) This frequency may be designated by common consent as an inter-system mutual assistance frequency under an area-wide medical communications plan.

(6) Frequencies in this band will be assigned for low power wireless microphones in accordance with the provisions of § 90.265 of this part.

(7) The frequencies available for use at fixed stations in this band and the requirements for assignment are set forth in § 90.261 of this part. Operation on these frequencies is secondary to stations in the Industrial and Land Transportation Radio Service where they are assigned for land mobile operations.

(8) This frequency is available in this service on a shared basis with all other Public-Safety Radio Services.

(9) The continuous carrier mode of operation may be used for telemetry transmission on this frequency.

(10) This frequency is shared with the Police and Fire Radio Services. This frequency may be designated by common consent for intra-system and inter-system mutual assistance purposes and is subject to the coordination requirements specified in § 90.175 of this part.

(11) This frequency is primarily authorized for use in the dispatch of medical care vehicles and personnel for the rendition or delivery of medical services. This frequency may also be assigned for intra-system and inter-system mutual assistance purposes. For uniformity in usage, the frequency pairs 462.950/467.950 and 462.975/467.975 MHz may be referred to as MED-9 and MED-10, respectively.

(12) This frequency is shared with Police Radio Service licensees authorized prior to April 16, 1976. This frequency is available on a primary basis to operations by licensees in the Emergency Medical Radio Service.

(13) For applications for new radio systems received after August 15, 1974, the eight frequency pairs listed below will be assigned in a block for shared operation under § 90.27(a) of this section subject to the following:

(i) For uniformity in usage, these frequency pairs may be referred to by channel name as follows:

Frequencies Base and Mobile Megahertz:	Mobile only (MHz)	Channel name
463.000	468.000	MED-1
463.025	468.025	MED-2
463.050	468.050	MED-3
463.075	468.075	MED-4
463.100	468.100	MED-5

463.125	468.125	MED-6
463.150	468.150	MED-7
463.175	468.175	MED-8

(ii) Except as provided in paragraphs (c)(13)(iii) and (iv) of this section, mobile or portable stations must employ equipment that is both wired and equipped to transmit/receive, respectively, on each of these eight frequency pairs with transmitters operated on the 468 MHz frequencies.

(iii) Portable (hand-held) units operated with a maximum output power of 2.5 watts are exempted from the multi-channel equipment requirements specified in paragraph (c)(13)(ii) in this section.

(iv) Stations located in areas above line A, as defined in § 90.7 will be required to meet multi-channel equipment requirements only for those frequencies up to the number specified in paragraph (c)(13)(ii) of this section that have been assigned and coordinated with Canada in accordance with the applicable U.S.-Canada agreement.

(14) Subpart L contains rules for assignment of frequencies in the 470-512 MHz band.

(15) Subpart S contains rules for assignment of frequencies in the 806-824 MHz and 851-869 MHz bands.

(16) Assignment of frequencies above 928 MHz for operational-fixed stations is governed by Part 94 of this Chapter.

(17) This frequency band is available in this service subject to the provisions of 90.259 of this part.

(18) Available only on a shared basis with stations in other services, and subject to no protection from interference due to the operation of industrial, scientific, or medical (ISM) devices. In the 2483.5-2500 MHz band, no applications for new or modifications to existing stations to increase the number of transmitters will be accepted. Existing licensees as of July 25, 1985, or on a subsequent date as a result of submitting an application for license on or before July 25, 1985, are grandfathered and their operation is co-primary with the Radio-determination Satellite Service.

(19) Paging licensees as of March 20, 1991, may continue to operate on a primary basis until January 14, 1998.

(20) This frequency is authorized for use only for operations in bio-medical telemetry stations. F1B, F1D, F2B, F2D, F3E, G1B, G1D, G2B, G2D and G3E emissions may be authorized. Entities eligible in this Radio Service may use this frequency on a secondary basis for any other permissible communications consistent with § 90.27(a) of this section.

(21) This frequency is authorized only for communications between medical facilities vehicles and personnel related toh)[medical supervision and instruction for the treatment and transport of patients in the rendition or delivery of medical services. F1B, F1D, F2B, F2D, G1B, G1D, G2B, F3E and G3E emissions are authorized. Entities eligible in this Radio Service may use this frequency on a secondary basis for any other permissible communications consistent with § 90.27(a) of this section.

(22) Local government highway radio call box operations first licensed prior to 3/31/80 on this frequency may continue to operate in accordance with § 90.17(c)(11) of this part.

(23) This band is available for Digital Termination Systems and for associated internodal links under Part 94 of this Chapter. No new licenses will be issued under this subpart but current licenses will be renewed.

(24) Frequencies in this band are available only for one-way paging operations in accordance with § 90.494.

(25) Rules concerning the use of this frequency are set forth in Subpart T.

(26) This frequency is also authorized for use for operations in bio-medical telemetry stations. F1B, F1D, F2B, F2D, F3E, G1B, G1D, G2B, G2D, and G3E emissions may be authorized for bio-medical transmissions.

3. Section 90.53 is revised to read as follows:

§ 90.53 Frequencies available.

(a) * * *

Special Emergency Radio Service Frequency Table

Frequency or band	Class of station(s)	Limitations
Kilohertz:		
2000-3000	Fixed	1
2726	Base or mobile	2
3201	do	
Megahertz:		
33.02	do	3,25
33.04	do	25
33.06	do	3,25
33.08	do	25
33.10	do	3,25
35.02	Mobile	27
35.64	Base	
35.68	do	4
37.90	Base or mobile	3,25
37.94	do	3,25
37.98	do	3,25
43.64	Base	4,28
43.68	do	4
45.92	Base or mobile	25
45.96	do	25
46.00	do	25
46.04	do	25
47.42	do	5,25
47.46	do	25
47.50	do	25
47.54	do	25
47.58	do	25
47.62	do	25
47.66	do	25
72.00 to 76.00	Operational-fixed	6

150-170	Base or mobile	30
152.0075	Base	4,31
155.160	Base or mobile	25
155.175	do	25
155.205	do	25
155.220	do	25
155.235	do	25
155.265	do	25
155.280	do	25
155.295	do	25
157.450	Base	4,11
163.250	do	4
169-172	Mobile	33
450-470	Fixed	12
453.025	Base	26
453.075	do	26
453.125	do	26
453.175	do	26
806 to 824	Mobile	21
851 to 869	Base or mobile	21
928 and above	Operational-fixed	22
929 to 930	Base only	7
1427 to 1435	Operational-fixed, base or mobile	23
2450 to 2500	Base or mobile	24
10,550 to 10,680	do	9

(b) * * *

(7) Frequencies in this band are available only for one-way paging operations in accordance with § 90.494 of this part.

(8) [Reserved]

(9) The frequencies in the band 10.55-10.68 GHz are available for Digital Termination Systems and for associated internodal links in the Point-to-point Microwave Radio Service. No new licenses will be issued under this subpart but current licenses will be renewed.

(10) [Reserved]

* * * * *

(13) [Reserved]

(14) [Reserved]

(15) [Reserved]

(16) [Reserved]

(17) [Reserved]

(18) [Reserved]

(19) [Reserved]

(20) [Reserved]

* * * * *

(26) Paging licensees as of March 20, 1991, may continue to operate on a primary basis until January 14, 1998.

* * * * *

(29) [Reserved]

* * * * *

(32) [Reserved]

* * * * *

(34) [Reserved]

* * * * *

4. Section 90.55 is amended by revising the first sentence of the introductory text to read as follows:

§ 90.55 Paging operations.

Paging operations may be authorized in this service only on frequencies assigned under the provisions of §§ 90.53(b)(4), (7), (25) and (26) of this part. * * *

* * * * *

5. Section 90.176 is amended by revising paragraphs (a) and (b) and adding paragraph (c) to read as follows:

§ 90.176 Interservice sharing of frequencies in the 150-174 and 450-470 MHz bands.

(a) Entities eligible in the Public Safety Radio Services governed by this rule part may apply to use any of the 150-174 and 450-470 MHz frequencies allocated to these services. Applicants are required to make the showing set forth in paragraph (c) of this section.

(b) Entities eligible in the Special Emergency Radio Service or the Industrial and Land Transportation Radio Services governed by this rule part may apply to use any of the above-mentioned frequencies allocated to these services. Applicants are required to make the showing set forth in paragraph (c) of this section.

(c) Applications for frequencies available under this rule must be accompanied by:

(1) A determination by the applicable frequency coordinator that there are no satisfactory frequencies available within the applicant's own radio service in the area of desired operation;

(2) A demonstration that the frequency(ies) requested in another radio service are not assigned in that radio service in the area of desired operation;

(3) A statement from the frequency coordinator having responsibility for coordination in the radio service or group in which the frequency is assigned concurring in its assignment in the manner requested. In cases where concurrence is not given, the coordinator must provide an explanation why the requested sharing is inappropriate;

(4) A statement or showing that the proposed use of the assignment will not violate any of the technical limitations applicable in the service or services to which the frequency is regularly allocated.

6. Section 90.311(a) is amended by revising the table column heading under "Public Safety Pool" to list the radio services as follows:

* * * * *

Fire, Police, Local Government, Highway Maintenance, Forestry Conservation and Emergency Medical Radio Services.

* * * * *

7. Section 90.555 is amended by revising the list of letter symbols under Public Safety Services in the table in paragraph (a), revising the entries for the applicable frequencies in paragraph (b) and adding the frequencies 220.9025 through 221.9225 in paragraph (b) to read as follows:

§ 90.555 Combined frequency listing.

(a) * * *

PUBLIC SAFETY SERVICES

PF-Fire.

PH-Highway maintenance.

PL-Local government.

PO-Forestry-conservation.

PP-Police.

PS-Special Emergency.

PM-Emergency Medical.

(b) Combined frequency list.

Frequency	Services	Special limitations
	* * * * *	
150.775	PM	Mobile
150.790	PM	Do.
	* * * * *	
155.325	PM	
155.340	PM	
155.355	PM	
	* * * * *	
155.385	PM	
155.400	PM	
	* * * * *	
453.025	PM	
453.050	PL, PP, PF, PH, PO, PM	
453.075	PM	
453.100	PL, PP, PF, PH, PO, PM	
453.125	PM	
453.150	PL, PP, PF, PH PO, PM	
453.175	PM	
453.200	PL, PP, PF, PH PO, PM	
	* * * * *	
453.250	PL, PP, PF, PH PO, PM	
	* * * * *	
453.300	PL, PP, PF, PH PO, PM	
	* * * * *	
453.350	PL, PP, PF, PH PO, PM	
	* * * * *	
453.400	PL, PP, PF, PH PO, PM	
	* * * * *	
453.450	PL, PP, PF, PH PO, PM	
453.500	PL, PP, PF, PH PO, PM	
	* * * * *	
453.550	PL, PP, PF, PH PO, PM	
	* * * * *	
453.600	PL, PP, PF, PH PO, PM	
	* * * * *	
453.650	PL, PP, PF, PH PO, PM	
	* * * * *	
453.700	PL, PP, PF, PH PO, PM	
	* * * * *	
453.750	PL, PP, PF, PH PO, PM	
	* * * * *	
453.800	PL, PP, PF, PH PO, PM	
	* * * * *	
453.850	PL, PP, PF, PH PO, PM	
	* * * * *	
453.900	PL, PP, PF, PH PO, PM	
	* * * * *	
453.950	PL, PP, PF, PH PO, PM	
	* * * * *	
458.025	PM	
458.050	PL, PP, PF, PH PO, PM	
458.075	PM	
458.100	PL, PP, PF, PH PO, PM	
458.125	PM	
458.150	PL, PP, PF, PH PO, PM	
458.175	PM	
458.200	PL, PP, PF, PH PO, PM	
	* * * * *	
458.250	PL, PP, PF, PH PO, PM	
	* * * * *	
458.300	PL, PP, PF, PH PO, PM	
	* * * * *	
458.350	PL, PP, PF, PH PO, PM	
	* * * * *	
458.400	PL, PP, PF, PH PO, PM	
	* * * * *	
458.450	PL, PP, PF, PH PO, PM	
	* * * * *	
458.500	PL, PP, PF, PH PO, PM	
	* * * * *	
458.550	PL, PP, PF, PH PO, PM	

* * * * *

458.600	PL, PP, PF, PH PO, PM	

* * * * *

458.650	PL, PP, PF, PH PO, PM	

* * * * *

458.700	PL, PP, PF, PH PO, PM	

* * * * *

458.750	PL, PP, PF, PH PO, PM	

* * * * *

458.800	PL, PP, PF, PH PO, PM	

* * * * *

458.850	PL, PP, PF, PH PO, PM	

* * * * *

458.900	PL, PP, PF, PH PO, PM	

* * * * *

458.950	PL, PP, PF, PH PO, PM	

* * * * *

460.525	PP, PF, PM	
460.550	PP, PF, PM	

* * * * *

462.950	PM	Med 9
462.975	PM	Med 10
463.000	PM	Med 1
463.025	PM	Med 2
463.050	PM	Med 3
463.075	PM	Med 4
463.100	PM	Med 5
463.125	PM	Med 6
463.150	PM	Med 7
463.175	PM	Med 8

* * * * *

465.525	PP, PF, PM	
465.550	PP, PF, PM	

* * * * *

467.950	PM	Med 9
467.975	PM	Med 10
468.000	PM	Med 1
468.025	PM	Med 2
468.050	PM	Med 3
468.075	PM	Med 4
468.100	PM	Med 5
468.125	PM	Med 6
468.150	PM	Med 7
468.175	PM	Med 8

* * * * *

8. Section 90.719 is amended to read as follows:

§ 90.719 Individual channels available for assignment in the 220-222 MHz band.

Channels 171-200 are available to both Government and non-Government applicants, and may be assigned singly or in contiguous channel groups. Channels 171-180 are available for any use consistent with this subpart. Channels 181-185 are set aside for Emergency Medical Radio Service use under Subpart B. Channels 186-200 are set aside for data only operations until March 31, 2000. The term "data", for purposes of this subpart, includes the transmission of text, control codes, and other information typical of machine-to-machine communications. Digitized voice signals are considered data signals under this subpart.

APPENDIX B

List of Parties Filing Comments

Alaska Advisory Council on EMS

Alaska Department of Administration

Area Rescue Consortium of Hospitals, Inc.

Associated Public-Safety Communications Officers, Inc.

Association of Air Medical Services

Brown University

Buncombe County Emergency Services

California Ambulance Association

California Emergency Medical Services Authority

Careflite Dallas

Catawba Memorial Hospital

City of Danbury, Connecticut

Communications Division

Connecticut Office of Emergency Medical Services

County of Forsyth

County of San Diego, California

Eastern Connecticut Emergency Medical Services Council, Inc.

Emergency Medical Services Administrators' Association of California

Emergency Medical Services Agency, Inc.

Fire Department of City of Plano, Texas

Fire and Rescue Department of Fairfax Country, Virginia

Fire Mutual Aid System

Florida Department of General Services

Gibson County ambulance Authority

Hawaii Department of Health

Healthcare Information and Management Systems Society

Highland Park Hospital

Hospital Central Services

Hospital Council of Southern California

International Municipal Signal Association and International Association of Fire Chiefs, Inc.

Hennepin Information Services Communications

Kentucky Ambulance Providers Association, Inc.

Los Angeles County Emergency Medical Services Agency

Los Angeles County Internal Services Department

Massachusetts Department of Public Health

MEDIC IV EMS Project

Mid-Carolina EMS Advisory Councilh)[National Association of Business and Educational Radio, Inc.

National Association of State Emergency Medical Services Directors

National Ski Patrol System, Inc.

Nevada Department of Human Resources

New Mexico Department of Health

New York Department of Health

Pegram, Jeffrey D.

ProNet, Inc.

Region L Council of Governments

Santa Barbara Emergency Medical Services Agency

Sierra-Sacramento Valley Emergency Medical Agency

Special Industrial Radio Service Association, Inc.

Tennessee Department of Health and Environment

Texas Department of Health

Texas Hospital Association

Tredwell, Robert F.

Virginia Department of Health-EMS Division

Washington Department of Health

West Orange First Aid Squad, Inc.

Western Piedmont Council of Governments

Westmoreland Hospital

List of Parties Filing Reply Comments

Associated Public-Safety Communications Officers, Inc.

Ericsson Corporation

Healthcare Information and Management Systems Society

International Municipal Signal Association and

International Association of Fire Chiefs, Inc.

National Association of Business and Educational Radio, Inc.

PRONET, Inc.

University of Medicine and Dentistry of New Jersey

Whatcom County Fire District No. 2

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 92-141

In the Matter of

Expanded Interconnection with
Local Telephone Company Facilities

ORDER

Adopted: February 12, 1993; Released: February 16, 1993

By the Commission:

1. In the *Expanded Interconnection Order*, we required all Tier 1 local exchange carriers (LECs), except for the Puerto Rico Telephone Company, to file tariffs by February 16, 1993, offering expanded interconnection for DS1 and DS3 special access services.[1] That *Order* required the subject LECs to offer expanded interconnection in all end offices, serving wire centers, and other points relevant for calculating special access rates.

2. On December 18, 1992, to facilitate the initial implementation of expanded interconnection, we reconsidered on our own motion this aspect of the *Expanded Interconnection Order*.[2] Rather than requiring the subject Tier 1 LECs to file initial tariffs on February 16, 1993, for all interconnection points, we permitted them to file tariffs for only a subset of their central offices. Except for Southwestern Bell Telephone Company (SW Bell), we based each LEC's initial subset on the list it had developed of the central offices in which expanded interconnection was likely to be requested, as supplemented with central offices requested by interconnectors. Because SW Bell had not filed an initial list of central offices, we directed it to file a list of its 250 largest central offices. This list, as supplemented by interconnector requests, was to constitute the offices in which SW Bell was initially to offer DS1 and DS3 expanded interconnection. We also established new procedures for the tariffing of additional central offices subsequent to the effectiveness of the expanded interconnection tariffs.

3. On December 28, 1992, SW Bell filed a list containing its largest 250 central offices,[3] as required by the *Reconsideration Order*. In conjunction with that filing, it also filed a list of 79 offices in which it stated it had received an actual indication of special access interconnector interest. SW Bell asserted that to accord it equal treatment with other LECs, the Commission should use this list of 79 central offices, supplemented by interconnector requests for additional central offices, as the basis for determining the central offices that SW Bell should include in its February tariff filing. SW Bell asked interconnectors to file requests for additional offices for both lists. On February 4, 1993, SW Bell submitted a list containing 127 central offices in which it proposed to offer expanded interconnection in its tariffs to be filed on February 16, 1993.[4] SW Bell stated that this list was acceptable to "AT&T, MCI, MFS, MWR Fibercom, PSO MetroLink, Sprint, and Teleport."[5]

4. After reviewing the SW Bell filings and the procedures they employed, we modify the requirement that SW Bell file tariffs offering expanded interconnection in its largest 250 central offices and authorize it to file initial expanded interconnection tariffs offering DS1 and DS3 expanded interconnection in the 127 central offices listed in its February 4, 1993, filing. The procedures SW Bell employed in developing the list of 127 central offices generally conform to those used by the other LECs in compiling their central office lists, which the Commission approved in the *Reconsideration Order*. In addition, SW Bell is subject to the requirement that the expanded interconnection tariffs contain procedures that permit interconnectors to request expanded interconnection in central offices that are not tariffed initially. Based on these considerations and on the SW Bell representation that this smaller list is acceptable to major potential interconnectors, we conclude that expanded interconnection will be available initially in those SW Bell central offices of interest to interconnectors if SW Bell's initial tariff includes only the 127 central offices listed in its filing of February 4, 1993. Use of this more targeted list will facilitate the initial implementation of expanded interconnection and ensure that our procompetitive goals in this proceeding will be achieved.

5. Accordingly, IT IS ORDERED, pursuant to authority contained in Sections 1, 4(i), 201-205 and 214(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, 201-205, and 214(d), that Southwestern Bell Telephone Company SHALL FILE TARIFFS on February 16, 1993, offering interstate expanded interconnection in the 127 central offices listed in its February 4, 1993, filing with the Commission.

6. IT IS FURTHER ORDERED, that this order IS EFFECTIVE upon release.[6]

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[1] *Expanded Interconnection with Local Telephone Company Facilities*, CC Docket No. 91-141, 7 FCC Rcd 7369 (1992), at ¶ ¶ 103, 259.

[2] *Expanded Interconnection with Local Telephone Company Facilities*, CC Docket No. 91-141, FCC 92-552 (released Dec. 18, 1992) (*Reconsideration Order*).

[3] Letter from Michael J. Zpevak, Attorney, Southwestern Bell, to Donna R. Searcy, Secretary, FCC, filed Dec. 28, 1992.

[4] Letter from William A. Blase, Jr., Director-Federal Regulatory, Southwestern Bell, to Donna R. Searcy, Secretary, FCC, filed Feb. 4, 1993.

[5] *Id.* at 2.

[6] Because this order relieves a restriction and the immediacy of the tariff filing date, we make this order effective upon less than thirty days notice. Accordingly, the order shall be effective upon release. *See* 5 U.S.C. § 553(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 89-553

In the Matter of

Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool

Modification of FCC Rule Section 90.627(b) Governing Multiple Sites for Specialized Mobile Radio Service Systems In Rural Markets — RM-6724

Amendment of Parts 2 and 94 of the Commission's Rules to Allocate Spectrum in the 896-901 MHz and 935-940 MHz Frequency Bands for Multiple Address System and Point-to-Point Operations — RM-6579

FIRST REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: January 14, 1993; Released: February 12, 1993

Comment Date: April 23, 1993
Reply Comment Date: May 10, 1993

By the Commission: Commissioner Barrett issuing a separate statement.

TABLE OF CONTENTS

Topic	Paragraph No.
I. Introduction	1 - 3
II. Background	4 - 6
III. Discussion	7
A. Further Notice of Proposed Rule Making	
(1) 900 MHz Spectrum	
(a) Channel Allotment	8 - 19
(b) Entry Requirements	20 - 25
(c) Licensee Selection	26 - 31
(d) Construction Requirements	32 - 42
(e) License Modification	43 - 44
(2) Existing Secondary Sites of Phase I Licensees	45 - 46
B. Report and Order	47
(1) Station Identification	48 - 49
(2) Fixed Use	50 - 52
(3) Construction and Placed in Operation Requirements	53 - 55
IV. Conclusion	56
V. Procedural Matters	57 - 59
VI. Ordering Clauses	60 - 62

I. INTRODUCTION

1. On November 28, 1989, we adopted a *Notice of Proposed Rule Making* (*Notice*) to determine the most appropriate method of further licensing the channels allocated to the Specialized Mobile Radio (SMR) Service in the 896-901/935-940 MHz (900 MHz) band.[1] Our decision to issue the *Notice* resulted from our assessment that additional flexibility needed to be introduced into our regulatory scheme for licensing SMRs in order to keep pace with changes in the industry and to provide for the most efficient use of the SMR spectrum. Accordingly, in the *Notice* we proposed nationwide licensing of 900 MHz SMR facilities, fixed use of SMR channels on a co-primary basis with mobile operations in rural areas, and multiple-site licensing of rural SMRs in both the 800 and 900 MHz bands.[2] After observing the development of the 900 MHz SMR service and general trends in the SMR market in the years since the *Notice* was adopted, we find that the best means for enhancing 900 MHz SMR service is by adopting rules that will promote nationwide and regional operations. We believe, however, that changes in the SMR industry have left us with proposals and a record that may no longer accurately reflect the best means of licensing the 900 MHz SMR spectrum. Accordingly, we have limited the scope of this *Report and Order* and combined it with a *Further Notice of Proposed Rule Making* containing proposals we believe will provide an environment ripe for the development of a technologically innovative and competitive communications industry.

2. To provide for the development of a new and competitive 900 MHz SMR service, we are proposing rules to license the 900 MHz SMR spectrum on a nationwide, regional, and local basis. The 900 MHz SMR allocation currently consists of 200 channel pairs and is licensed on a local basis in groups of 10 channel pairs each. *See Report and Order*, Gen. Docket No. 84-1233, 2 FCC Rcd 1825, 1831 (1986). In this *First Report and Order and Further Proposed Notice of Rule Making* we are seeking comment on proposals to:

[1] Notice of Proposed Rule Making, PR Docket No. 89-553 (*Notice*), 4 FCC Rcd 8673 (1989).
[2] *Notice*, 4 FCC Rcd at 8675-8777.

License 900 MHz SMR systems in a combination of nationwide, regional, and local systems (*see* paragraphs 11 - 19, *infra*).

Limit the number of nationwide and regional licenses that can be controlled by a single licensee (*see* paragraph 18, *infra*).

Initially restrict eligibility for a nationwide or regional license to existing 900 MHz licensees that have established a significant presence in the 900 MHz SMR market (*see* paragraphs 28 - 30, *infra*).

Require applicants for nationwide and regional licenses to meet certain financial qualifications and submit detailed plans for constructing and operating their proposed systems (*see* paragraphs 22 - 24, *infra*).

Provide ten-year license terms for nationwide and regional licensees, and impose minimum construction benchmarks for retention of and assignment and transfer of nationwide and regional licenses (*see* paragraphs 34 - 42, *infra*).

Require that systems counting towards satisfaction of the minimum construction requirements consist of at least one base station in each market that serves a minimum area and has a minimum number of channels in operation (*see* paragraph 37, *infra*).

Grant primary status to the secondary sites of existing 900 MHz licensees (*see* paragraphs 45 and 46, *infra*).

3. In addition we are adopting rules to:

Exempt stations that normally transmit digital signals from station identification requirements (*see* paragraph 49, *infra*).

Retain the secondary status of fixed operations to mobile operations (*see* paragraph 52, *infra*).[3]

o Cancel automatically both 800 MHz and 900 MHz SMR licenses if a licensee discontinues operations for a period exceeding sixty days and does not notify the Commission in writing. (*see* paragraph 54, *infra*).

II. BACKGROUND

4. In 1986, the Commission allocated 200 channel pairs in the 900 MHz band for use in the SMR service.[4] Subsequently, the staff released a *Public Notice* that established a two phase process for licensing these channels.[5] In the *1986 Public Notice*, the staff identified the top 50 markets and established 46 Designated Filing Areas (DFAs) encompassing those markets.[6] During the first phase of licensing (Phase I), we accepted applications for stations located within each of 46 DFAs.[7]

5. The second phase of licensing (Phase II) was to take place following the completion of Phase I. During Phase II, we had planned to accept applications for 900 MHz SMR facilities located within a 100-mile radius of the urban center of each of the 50 largest markets as defined by the *1986 Public Notice*. After a review of the licensing records of 800 MHz SMR systems, however, we concluded that by artificially restricting the areas where 900 MHz systems could operate, we could adversely affect the development of the 900 MHz service. We therefore questioned whether the public might be better served if 900 MHz service were allowed in all areas of the country rather than being restricted to areas around the top markets.[8]

6. Growth of the 900 MHz service since we began licensing has been significantly less than we had anticipated.[9] On the other hand, wide-area systems are being introduced in the 800 MHz SMR service with the ultimate goal of creating seamless regional and nationwide systems.[10] The large and diverse number of licensees in the 800 MHz band, however, makes it very difficult and costly to implement such service. The 900 MHz SMR channels, with fewer licensees, presents a unique opportunity for implementing regional or nationwide systems. Considering the changes that have occurred in the SMR industry since the *Notice* was issued, the record developed in this proceeding, and the petitions we have received during the interim, we find it appropriate to modify and seek further comment on some of the proposals contained in the *Notice* and to defer action on certain others.[11]

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[3] Our discussion concerning fixed operations on 900 MHz SMR spectrum addresses issues raised by the American Petroleum Institute (API) in a petition requesting reallocation of the 200 SMR channels in areas outside the 100 mile radius of each of the 50 top markets to fixed operations. *See* para. 50-52, *infra*.

[4] *See* Report and Order, Gen. Docket No. 84-1233, 2 FCC Rcd 1825, 1831 (1986).

[5] Private Land Mobile Application Procedures for Spectrum in the 896-901 MHz and 935-940 MHz Bands, 1 FCC Rcd 543 (1986) (*1986 Public Notice*) .

[6] Each of these DFAs is generally made up of one of the top 50 markets. In cases where two markets were close to each other, however, the two markets were combined to form one DFA. Generally, the DFAs are sufficiently separated to allow grants to be made in one DFA without affecting grants in other DFAs.

[7] *Notice*, 4 FCC Rcd at 8674. The *Notice* indicated that all available licenses have been granted where possible. Since that time, however, many of these licenses have been recovered due to licensees' failure to construct their systems. As a result, in only 9 of the top markets are all 20 licenses currently assigned.

[8] *Notice*, 4 FCC Rcd at 8674.

[9] Approximately one-third of the licenses granted for 900 MHz SMRs have been recovered for failure to construct. We also granted licensees in this service a two-year extension to satisfy the loading requirements of Section 90.631(b). This action was initiated by a petition filed by the National Association of Business and Educational Radio, Inc. (NABER), which cited various difficulties that 900 MHz SMR operators were having in establishing service. *See* Report and Order, PR Docket 92-17, 7 FCC Rcd 4914 (1992).

[10] For example on October 26, 1992, the American Mobile Telecommunications Association, Inc. (AMTA) filed a petition for rule making, RM 8117, that seeks to facilitate wide-area licensing procedures to promote the development of advanced regional SMR systems. Other petitions are currently before the Commission that propose to revise and amend our licensing and operational rules for SMRs to facilitate introduction of wide-area operations. *See* RM 8028 (filed March 6, 1992 by NABER); RM 8029 (filed March 13, 1992 by NABER) and RM 8030 (filed May 26, 1992 by A&B Electronics). Local service is generally provided by a single base station and is only capable of serving a limited area. Systems providing wide-area, regional, and nationwide service are comprised of multiple stations that are generally networked in some way to provide roaming capabilities and service over larger areas.

[11] Specifically, because we observe considerable interest in

III. DISCUSSION

7. The sweeping nature of the proposals in the *Notice* generated comments from a substantial number of industry participants, ranging from large service providers and equipment manufacturers to user organizations and small SMR operators.[12] Views varied widely among these commenters on the best use for the 900 MHz SMR spectrum and on our individual proposals. One issue that commenters uniformly supported, however, is our broad proposal to eliminate Phase II of our original plan for licensing 900 MHz SMR systems.[13] As discussed in the *Notice*, retention of our original licensing plan would delay the introduction of 900 MHz service in areas where a demonstrated desire for such service exists.[14] It would also artificially constrain growth of 900 MHz SMR service offerings with no resulting public benefit. Accordingly, we are eliminating the planned Phase II licensing process. There was considerable disagreement, however, as to the best use for the 900 MHz channels. Accordingly, while we have made tentative conclusions on how to license the 900 MHz SMR spectrum, we seek further comment on new proposals for licensing the 200 SMR channel pairs in the 900 MHz band in a way that will promote the development and continued growth of innovative mobile communications networks.[15]

A. Further Notice of Proposed Rule Making

(1) 900 MHz SMR Spectrum

(a) Channel Allotment

8. *Proposal.* In the *Notice*, we observed a growing demand for nationwide and regional service.[16] Implementation of systems capable of providing such service, however, is difficult under our current regulations, and attempts to do so have resulted in numerous waiver requests.[17] Accordingly, we proposed to license six blocks of ten channels each for construction of nationwide- compatible[18] SMR networks. Although nationwide licensees would be given great leeway in the design and implementation of a nationwide system, we proposed that these licensees be required to construct a minimum number of stations and that any base or mobile units operating on these channels be compatible.[19] We recognized that nationwide licensees in the 900 MHz band would face certain difficulties created by the previous licensing of 900 MHz channels in major markets, but we believed that they could overcome these difficulties by buying out or entering into leasing arrangements with Phase I licensees.[20]

9. *Comments.* The common ground that commenters find in this context is the need for both nationwide and regional SMR service.[21] Views varied widely, however, on the appropriate balance between nationwide, regional, and local service. A number of commenters view nationwide licensing as inefficient, especially in the 900 MHz band where there will be areas of the country that preclude nationwide operations because of the presence of existing local 900 MHz licensees. Some commenters also contend that insufficient demand has been demonstrated for a large allocation of nationwide channels and that the real need is for local wide-area systems.[22] Other commenters, however, argue that the number of channels proposed for nationwide ser-

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relief from the 40-mile rule beyond the limited relief we proposed for rural SMR operators, we will defer action on this issue to a future proceeding that will consider wide-area licensing of 800/900 MHz SMR channels allotted for "local" service. The 40-mile rule prohibits a licensee from being authorized an additional trunked or conventional system within 40 miles of an existing unloaded trunked system in the same frequency band. *See* 47 C.F.R. § 90.627(b).

[12] *See*, Appendix A for a list of commenters.

[13] *Notice*, 4 FCC Rcd at 8675. *See* NABER comments at 10; RAM comments at 5-6; Discomm comments at 3; ASNA comments at 1; and AMI comments at 3.

[14] For example, in the Las Vegas, Nevada area a waiting list exists for 800 MHz channels. Because Las Vegas is more than 100 miles from the nearest DFA, however, it would, under our original licensing plan, remain unserved by 900 MHz SMRs until the completion of Phase II.

[15] In light of our decision to defer licensing on the 900 MHz SMR channels, we will not implement waiting lists in the 900 MHz band at this time.

[16] *Notice*, 4 FCC Rcd at 8675.

[17] *Id. See, e.g.*, Memorandum Opinion and Order, File No. W-2667, 4 FCC Rcd. 3802 (1989) in which waivers of 47 C.F.R. §§ 90.629 and 90.631(e) and (f) were granted to allow American Mobile Data Communications, Inc. (AMDC) to implement a nationwide two-way mobile data communications network that will ultimately include all 46 DFAs. *See also* Letter of May 17, 1990 to Robyn G. Nietert, Esq. from Richard Shiben, Chief, Land Mobile and Microwave Division, (granting the request of Millicom Inc. for rule waivers); Advanced Train Control System, 3 FCC Rcd 427 (1988) (the Commission granted waivers of Sections 90.621(d), 90.623(a), 90.629, 90.633 and 90.651(c) of the Commission's Rules to license use of six conventional 900 MHz frequency pairs for a nationwide train control network). In a recent proceeding we set aside a number of channels specifically for nationwide use. Report and Order, PR Docket 89-552 (*220 MHz)*, 6 FCC Rcd 2356 (1991) and Memorandum Opinion and Order, *220 MHz*, FCC 92-261, 57 Fed. Reg. 32448 (1992).

[18] A compatible nationwide system is one in which base stations and mobile or portable units use a standardized protocol and are capable of communicating with one another. *See Notice* at 8676.

[19] *Notice*, 4 FCC Rcd at 8675.

[20] *Notice*, 4 FCC Rcd at 8673-8675.

[21] *See* Discomm comments at 5; AMI comments at 8; NABER comments at 12; ASNA comments at 11-12; Motorola reply comments at 8; and UTC comments at 5.

[22] *See* Johnson comments at 3. Motorola comments at 12. UTC comments at 3.ASNA comments at 11-12. NABER comments at 10-11. NABER also argues that our proposal for national licenses is outside the scope of this proceeding because it conflicts with the alleged purpose of Phase II, to provide an assignment system through which Phase I licensees will be protected. NABER's arguments are without merit. First, our proposal for national licenses does not diminish the protection afforded Phase I licensees. Pursuant to 47 C.F.R. § 90.621(b), existing licensees will continue to be afforded 113-km (70-mile) co-channel protection from national licensees constructing in or near a Phase I DFA. Second, to the extent that NABER's argument is essentially an attack on procedural grounds, it is also without merit. In the *Notice* we stated our intention to reserve several blocks of channels for systems proposing nationwide service and solicited commenters' views on this issue. *See Notice*, 4 FCC Rcd at 8675. Finally, any attempt by NABER to assert that the Commission has abused its discretion by altering its perception of the public interest must also be rejected. It is well settled that the Commission has broad discretion to alter its approach to a particular issue. *See* Telocator Network of America v. FCC, 691 F.2d 525, 540 (D.C. Cir. 1982); WJG Television Co. v. FCC, 675 F.2d 386, 389 (D.C. Cir. 1982).

vice is appropriate and, in fact, should be increased.[23] These commenters believe that the demand for nationwide licenses has not been overestimated and that theproposed nationwide licenses in the 900 MHz band present a unique opportunity to fulfill an unmet public need.

10. *Further Proposal.* Based on the record developed in this proceeding, and recent developments in the SMR industry, we remain convinced that the public interest will best be served through implementation of nationwide and regional licensing for 900 MHz SMR spectrum. It appears that SMR customers are demanding wider-area service, and that existing 900 MHz licensees have been frustrated in their ability to meet those customer needs as well as develop a competitive market for their services due to our two-phased, locally-based licensing of 900 MHz systems. We therefore believe that the greatest potential for future growth of 900 MHz SMR services may lie in the development of nationwide and regional offerings rather than through local licensing structured along the lines of 800 MHz SMR systems. One way to accomplish this purpose is to allow existing licensees to expand into the regions surrounding their current service area. *See* para. 17, *infra.* Another approach is to license some 900 MHz SMRS on a nationwide and/or regional basis. We explore all these alternatives in this proceeding.

11. Only the largest markets have many 900 MHz systems that are constructed and operational. Several entities, such as RAM, however, are actively developing nationwide networks that would offer an SMR service distinct from what is available at 800 MHz. Licensing the 900 MHz SMR spectrum on a nationwide and regional basis could provide an opportunity for the development of unique communications services in the most efficient manner without the regulatory burden currently imposed on local systems. As described below, sufficient flexibility given to nationwide and regional licensees should result in an efficient method of providing nationwide, regional, and even local service because licensees will be able to reconfigure systems to achieve the desired coverage throughout an area without being hampered by overly restrictive regulations and without the delays created by the licensing process.

12. To establish a technologically innovative nationwide and regional 900 MHz service, we seek comment on a proposal that the majority of the 200 channels available in the 900 MHz SMR service be licensed on a nationwide and regional basis. We tentatively conclude that we should license 60 of the 900 MHz SMR channels on a nationwide basis.[24] In addition, we propose that 120 of the remaining 140 channels be licensed on a regional basis with the remaining 20 channels to be licensed on a "local" basis.[25] Although we have tentatively concluded to license 60 channels on a nationwide basis and have provided proposals below on how to license the remaining 900 MHz SMR spectrum we welcome comments on any alternative divisions of the spectrum among nationwide, regional, and local allocations.

13. Our goal in licensing on a nationwide basis is to provide for development of innovative and highly efficient systems.[26] As discussed by Millicom, it would be difficult for a licensee to maximize system efficiency with a single block of ten channels.[27] Currently, there is a trend in the SMR industry towards constructing systems comprised of small, closely-spaced, low-power sites that maximize frequency reuse.[28] Because this type of system divides available channels among multiple sites, the efficiencies of trunking are lost unless the licensee has access to a substantial number of channels. Accordingly, we propose that each 900 MHz nationwide license consist of one twenty-channel block. We propose that each nationwide licensee be limited to one nationwide license but that there be no restriction on the ability of the nationwide licensee to obtain additional channels on a local basis or one license on a regional basis per region.

14. Following this same reasoning we propose that regional licensees also be assigned a block of 20 channels. We note, however, that the benefits gained by frequency reuse increase dramatically as the number of channels available increases. To promote greater efficiency it may, therefore, be beneficial to assign licensees a greater number of channels so that they may reuse channels more vigorously. Several proposals that have been filed with us claim that a minimum of forty-two channels is desirable for a licensee to fully realize the benefits of frequency reuse and to construct an economically viable digital wide-area system.[29] Additionally, the increase in capacity gained by this type of system permits licensees to provide service to a significantly greater number of users and to provide a wider variety of services. We propose to license 120 of the

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[23] *See* RAM comments at 6. Millicom comments at 3-4.

[24] Use of channel pairs in the bands 898.50625 to 901.000 MHz and 937.50625 to 940.000 MHz is restricted within 110 km of the Mexican border and use of some or all of these channels is restricted within 110 km of the Canadian border. *See* 47 C.F.R. § 90.619. *See also* Agreement Between the Department of Communications of Canada and the Federal Communications Commission of the United States of America Concerning Use of the Bands 896 to 901 MHz and 935 to 940 MHz Along the United States - Canada Border (September 17, 1990) (Public Notice, October 3, 1990), and Memorandum of Understanding Between the Federal Communications Commission of the United States of America and the Secretaria de Comunicacions y Transportes of the United Mexican States Concerning the Use of the 896-901 and 935-940 MHz Bands for the Land Mobile Service Along the Common Border (August 11, 1992) (Public Notice, October 6, 1992).

[25] Channels licensed on a "local" basis would be licensed in accordance with current rules applicable to licensing SMR systems, 47 C.F.R. Part 90 Subpart S.

[26] *Notice*, 4 FCC Rcd at 8675.

[27] Millicom comments at 3-4. *See also*, Fleet Call petition RM 7985.

[28] *See*, nt. 17, *supra*. Additionally, in a *Memorandum Opinion and Order* adopted on February 13, 1991, the Commission recognized the merits of spectrum efficient, wide-area systems. Fleet Call, Inc., 6 FCC Rcd 1533 (1991). Since that *Memorandum Opinion and Order* was adopted we have received a number of requests proposing creation of wide-area systems. *See* Letter from Richard J. Shiben, Chief, Land Mobile and Microwave Division, Private Radio Bureau, to George Hertz, President, Advanced Mobilecomm of New England, Inc. dated April 3, 1992, *see also*, 1992 applications (file numbers 553493 through 553499) and associated waiver request filed by Advanced Radio Communications Services of Florida, Inc. on July 15, 1991. In addition, a number of similar waiver requests are currently pending.

[29] *See*, Petition for Rule Making filed October 26, 1992 by the American Mobile Telecommunications Association, Inc., RM-8117. *See also* request for waiver filed October 9, 1992, by PowerSpectrum.

remaining 140 SMR channel pairs in the 900 MHz band on a regional basis with six licenses of 20 channels each to be made available in each of the seven Regional Bell Operating Company (RBOC) regions. We request comment, however, on whether 20 channels is sufficient to fully realize the benefits of frequency reuse. We propose that the remaining 20 channels be licensed on a local basis in 10-channel blocks both within and outside of the DFAs. Local channels can be used to expand existing systems, create new systems, or be integrated into nationwide or regional networks.

15. In addition to the above proposal, we recognize that there are other possible alternatives that could prove feasible. Each option presents a trade-off between the benefits of providing each licensee a large number of channels and the benefits of increased competition by having more licensees. Other options "that we could consider are licensing 5 nationwide licensees with 40 channels each; licensing 3 nationwide licensees with 20 channels each, 3 regional licensees with 40 channels each, and reserving 20 channels for local systems; licensing 5 regional licensees with 40 channels each and declining to license either nationwide or local systems; licensing 6 regional licensees with 20 channels each, reserving 80 channels for local systems, and declining to license nationwide systems. Although we believe that our further proposal provides the best allotment of channels to lead to the development of technologically advanced systems, while maintaining sufficient competition through multiple licensees, any of these other options could prove viable. Commenters should support their preferred channel allotment plan through a detailed description of their preferred plan and a thorough analysis of why this particular plan best serves the public interest.

16. Although a number of commenters in this proceeding support licensing on a regional basis, the record provides little guidance regarding how regions should be defined or how regional licensing can be implemented.[30] We have recently concluded that the public interest would best be served by providing licensees introducing new mobile communications service with large regions as areas of operation.[31] Licensing on the basis of relatively large regions should provide economies of scale that will serve as an incentive for a licensee to provide complete state-of-the-art service throughout the entire region, including both urban and rural areas. These economies of scale would not be present if we were to divide the country into hundreds of small regions, many of which would be rural and possibly unable to support an independent modern communications system. Accordingly, we propose several possibilities for regional authorizations to include: authorizations based on the seven Regional Bell Operating Company (RBOC) regions;[32] 47 "Major Trading Areas,"; 487 "Basic Trading Areas,";[33] or 194 Local Access and Transport Areas (LATAs).[34] These regions are large, established, and well-defined and should provide ample opportunity for a licensee to implement a large regional communications network.[35] Commenters should provide justification in support of the regional structure they favor.

17. As an alternative to the above proposals, RAM has provided a licensing plan that would be a more direct outgrowth of the first licensing phase.[36] RAM proposes that the existing DFAs be extended into "Expansion Areas" that roughly correspond to the 47 Major Trading Areas. Under RAM's proposal, 100 channels would be available to existing Phase I licensees to expand their Phase I systems into regional systems within the Expansion Area that corresponds to its DFA. If 100 channels or less are constructed within a DFA or if existing licensees do not seek to expand on more than 100 channels, Phase I licensees would be able to expand on as many channels as they are currently licensed for in the DFA. If more than 100 channels have been constructed in a DFA, then the 100 channels would be apportioned among the existing licensees.[37] RAM proposes that the remaining 100 channels be available to both new and existing licensees with no preferences awarded to existing licensees. We ask for comment on all aspects of the RAM proposal, including whether, in the interest of establishing a competitive market for 900 MHz SMR service, the RAM proposal should be modified to further limit the number of channels available for expansion of Phase I licensees.

18. To give licensees the flexibility required to satisfy a variety of communications needs, we ask for comment on a proposal that nationwide and regional licensees not be required to operate fully networked, compatible systems. We note that RAM and Millicom that argue nationwide licensees should be strictly held to constructing a fully interconnected nationwide network to ensure that this spectrum is not wasted on traditional stand-alone SMR facilities.[38] We tentatively conclude that a licensee assigned a block of channels on a nationwide or regional basis should have the flexibility to use its allocation in any manner that meets its customers' needs, including the use of traditional systems. In order to promote continued competition among providers we tentatively conclude that some limitation on the number of licenses or channels controlled by a single entity is necessary. One possibility is to limit a single entity to an interest in no more than one nationwide and one regional license in each region, or limit each entity to two regional licenses per region. This would permit a licensee to use either nationwide or regional systems to accumulate forty channels throughout the country.[39] Alternatively, entities could be limited to one regional license per region and a second regional license in

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[30] *See* para. 9 *supra*.

[31] Amendment of the Commission's Rules to Establish New Personal Communications Services (*PCS*), 7 FCC Rcd 5676, 5700 (1992). This proceeding also noted the high consolidation cost associated with combining a number of small systems to form a single large system, 7 FCC Rcd. 5676, 5699 (1992).

[32] *See U.S. v. Western Electric*, 569 F. Supp. 1057 (D.D.C. 1983).

[33] *See*, Rand McNally *1992 Commercial Atlas & Marketing Guide*, 123rd Edition, pp. 36-39.

[34] *See U.S. v. Western Electric*, 569 F. Supp. 1057 (D.D.C. 1983).

[35] Licenses would include all areas within each regional Bell operating company's region, including the areas within a region that may be served by other companies. Alaska, Hawaii, Puerto Rico and other possessions and territories will be included in the geographically closest market.

[36] RAM *Ex Parte* Report, PR Docket 89-553, filed December 29, 1992.

[37] RAM also proposes that all secondary sites constructed by Phase I licensees be granted primary status. *See* paras. 45 and 46 *infra*.

[38] RAM comments at 6-11. Millicom comments at 12-13.

[39] A nationwide/regional licensee could further supplement its system with local channels. Thus a licensee would be able to obtain 42 or more channels in an area. Forty-two channels has typically been cited as the minimum number of channels neces-

one or more regions. Another approach would place a limit on the total number of 900 MHz channels, rather than licenses, that an entity could own or control. For instance, we could limit each entity to no more than forty-two 900 MHz SMR channels, regardless of whether the channels come from nationwide, regional, or local licensing. If we adopt some limitation on regional and nationwide licensing we also request comment on whether it is necessary or desirable to limit the number of local 900 MHz SMR systems a nationwide or regional license could own or control. In addition we ask for comment on whether we should impose a limitation on the number of 900 MHz SMR systems a nationwide or regional licensee may operate pursuant to a management contract. We request comments on our proposed ownership restrictions on the number of licenses or channels.

19. We propose that Phase I licensees continue to be permitted to operate under their current authorizations and be protected from any co-channel nationwide or regional licensees.[40] We tentatively conclude, however, that any channels recovered from Phase I licensees that have been licensed for nationwide or regional use will be automatically assigned to the nationwide or regional licensee licensed to operate on those channels. Although some commenters argue that recovered channels should go to Phase I licensees with loaded systems,[41] we find that assigning the channels to the nationwide or regional licensee will achieve our goal of promoting nationwide and regional SMR service and will serve the public interest by placing spectrum in the hands of those licensees with the resources necessary to construct and operate communications systems on a nationwide or regional basis. Additionally, we tentatively conclude that the nationwide or regional licensee licensed to operate on a particular channel will be the only entity eligible to be awarded a "finder's preference" for that channel.[42]

(b) Entry Requirements

20. *Proposal.* In the past we have found that some SMR licensees selected by lottery were not prepared to construct and operate their SMR facilities, as evidenced by the substantial number of licenses recovered under Phase I for failure to construct.[43] The filing of speculative applications causes a substantial delay in service to the public, and the resulting "secondary market" for licenses increases the costs of doing business for legitimate service providers. As a curb against such speculation, we proposed in the *Notice* that applicants for nationwide licenses certify that they have the communications experience necessary to construct the type of system proposed and that they have either assets in excess of 50 million dollars or a firm financial commitment for financing to construct and operate the system for ten years.[44] Additionally, we proposed that applicants submit a detailed ten-year construction plan with their initial applications, including proposed system architecture, sites, and construction schedule.[45] Finally we proposed a filing fee for a nationwide application based on the then statutory filing fee of $30 per call sign.[46]

21. *Comments.* We requested comments on our proposed entry requirements as well as recommendations of other methods to deter the filing of speculative applications. Considering the potential value of a nationwide license, commenters agree that entry requirements are necessary to deter speculators and to ensure that licenses are awarded to entities capable of implementing a nationwide system. While commenters generally found the proposed entry criteria appropriate, there was some disagreement on the specific proposals.[47] For example, some commenters feel that the financial certification should be based on the realistic cost of a proposed system rather than an arbitrary figure, and that it may be inappropriate to require prior communications experience.[48] RAM, in particular, felt our proposed entry criteria were too permissive and proposed more stringent criteria that would require an existing presence in most of the top markets, would limit applicants' ability to use consultants to satisfy our "experience" requirement, would give a preference to applicants proposing the use of digital technology, and would require the filing

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sary to fully realize the benefits of frequency reuse. *See* Petition for Rule Making filed October, 26, 1992, by the American Mobile Telecommunications Association, Inc., RM-8117.

[40] Accent Radio Service, Inc. (Accent). AMI and NABER have raised the issue of providing protection to Phase I applicants in the San Diego, California DFA (Accent comments at 2-9. AMI comments at 21 and reply comments at 4-5. NABER reply comments at 5). Due to San Diego's proximity to the Mexican border licensing in the San Diego DFA has been delayed. An agreement with the Mexican government, however, regarding use of the 900 MHz frequencies within 110 km of the Mexican border was signed on August 11, 1992. Accordingly, the Private Radio Bureau's Licensing Division has begun licensing procedures for the San Diego DFA and it is anticipated that licenses will be granted prior to the grant of any authorizations issued pursuant to this *Report and Order*. *See Order*, Amendment of Subpart S and T of Part 90 of the Rules to Permit Licensing of Channels in the 896-901/935-940 MHz and 220-222 MHz Bands in the U.S./Mexico Border Area, 7 FCC Rcd 7154 (1992).

[41] NABER comments at 13-14. Motorola comments at 11. Fleet Call reply comments at 5-6. ASNA reply comments at 7. A "loaded" system would be a system with at least 70 mobiles per channel. *See* 47 C.F.R. § 90.631(b).

[42] *See* Report and Order, PR Docket 90-481, 6 FCC Rcd 7297 (1991).

[43] In accordance with 47 C.F.R. § 90.631(f), the licenses of facilities not constructed within one year from the grant of the license cancel automatically and are recovered by the Commission for reassignment or future use. In all but 9 of the 46 DFAs we recovered a substantial number, and in some DFAs all, of the 900 MHz licenses granted.

[44] *Notice*, 4 FCC Rcd at 8679. *See also* Report and Order, 220 MHz 6 FCC Rcd. 2356, 2363 (1991) and Memorandum Opinion and Order 220 MHz, 57 Fed Reg. 32448 (1992). For a discussion regarding the financial entry criteria in the cellular context, *see Fourth Report and Order*, CC Docket No. 85-388, 4 FCC Rcd 2542, 2545 (1990).

[45] *Notice*, 4 FCC Rcd at 8679.

[46] *Id.* at 8679. The statutory fee is now $35 per call sign. See 47 U.S.C. § 158.

[47] AMI comments at 20. ASNA comments at 13-14. NABER comments at 16. RAM comments at 25-28. Millicom reply comments at 17-23.

[48] *See* ASNA comments at 13-14. Millicom comments at 23-26.

of a specific implementation plan.[49] Commenters also expressed support for a filing fee in excess of the fee proposed in the *Notice*.[50]

22. *Further Proposal.* We agree with Millicom that any financial showing should be based on a realistic estimate of the actual costs to construct the applicant's proposed facilities rather than on an arbitrary figure. Accordingly, we propose that applications for nationwide licenses must include an estimate of the cost to construct 40 percent of the system and operate the proposed system for the first four years of the ten-year license term and a showing that the applicant has sufficient net current assets or a firm financial commitment to meet these costs.[51] Requiring such a financial showing should reduce the number of speculative filings and is not unreasonable in light of the size and nature of a nationwide allocation.[52] We decline to pursue our proposal to require an applicant for a nationwide license to demonstrate prior communications experience. As stated by Millicom, the lack of previous communications experience is no bar to the construction of a communications system by a licensee, and demonstration of such experience by an applicant is no guarantee of future success. Accordingly, we shall not have nationwide applicants certify that they have experience in the area of communications. We propose that any entity eligible under subpart S of Part 90 of the Commission's Rules be permitted to apply for nationwide and regional licenses provided they meet the above financial requirements.

23. For regional licenses we propose entry requirements similar to those proposed for nationwide systems. Accordingly, we propose a ten year license term for regional licensees. Given the smaller area covered under a regional license, however, we are proposing that minimum construction requirements be met within five years.[53] We propose that applicants be required to provide an estimate of the cost to construct 40 percent of its system and operate the system for the first two years of the ten-year license term and a showing that the applicant has sufficient net current assets or a firm financial commitment to meet these costs.

24. We also propose that each applicant for a nationwide or regional license submit a construction plan with its initial application[54] that includes a general implementation schedule and certification that the applicant will meet any applicable construction requirements. We propose that the construction plan include the proposed markets but not include specific station parameters or sites. While we would require nationwide and regional licensees to adhere to any benchmarks ultimately adopted, we propose that licensees not be strictly held to these proposals, but that they be allowed to amend their proposed construction schedules as circumstances warrant. The deciding factor will be whether service is being provided in the requisite number of markets or over the requisite minimum area, as appropriate. We request comments on our proposed ten-year license term, our proposal to require an estimate of and a demonstration that the applicant has the resources or a firm financial commitment to construct 40 percent of the system and operate the system for four years for a nationwide license or two years for a regional license, as well as our proposal to require a construction plan at the time the application is filed.

25. The statutory filing fee of $35 per call sign will apply. Because of the necessity to closely track the use of channels, especially in an untried licensing structure such as nationwide and regional SMR licenses, each channel at each site will require a separate call sign.[55] Because each licensee will not be compelled to construct all licensed channels at every site, we will assign separate call signs to each channel at each site rather than assigning a single call sign to a block of channels. Assignment of separate call signs to each channel will enable the Private Radio Bureau to put in place a mechanism for closely monitoring actual spectrum utilization in the context of this new nationwide and regional licensing scheme. While we fully expect that the greater flexibility nationwide and regional licensing provides will encourage more innovative use of spectrum, having in place a mechanism for tracking spectrum utilization will make it possible to promptly identify any instances where spectrum remains fallow, and, where appropriate, take corrective action. For nationwide licenses, based on the construction of base stations (*see* para. 35, *infra.*) in the minimum number of required markets (70) (*see* para. 35, *infra.*) multiplied by the number of channels authorized to each nationwide licensee (20) multiplied by the standard filing fee per call sign ($35),[56] the initial filing fee would be $49,000.[57] For regional licenses the minimum number of base stations required is ten (10) (*see* para. 38, *infra.*) multiplied by the number of channels authorized to each regional licensee (20) multiplied by the standard filing fee per call sign ($35),[58] the initial filing fee would be $7,000. The correct fee would be required to accompany every application for a nationwide or regional 900 MHz SMR license. We request comment on whether

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[49] RAM comments at 25-35. RAM does not believe, however, that applicants should be required to specify individual sites at such an early stage.

[50] RAM comments at 32-33. Millicom comments at 23.

[51] Applicants may rely solely on personal or internal resources to demonstrate their financial qualifications, or may obtain a firm financial commitment from a lender. *See generally* Fourth Report and Order, CC Docket No. 85-388, 4 FCC Rcd 2542 (1988). *See also* 47 C.F.R. § 22.917(c). *See also* 47 C.F.R. § 90.713.

[52] *See* Report and Order, 6 FCC Rcd 2356. The standard we are proposing herein is the same standard adopted in that proceeding for commercial operations in the 220-222 MHz band.

[53] *See* paras. 38 - 42, *infra.*

[54] A similar requirement for the 220-222 MHz band was adopted in PR Docket 89-552. *See* 47 C.F.R. § 90.713.

[55] Although it will not be necessary for the applicant to identify specific locations at the time the application is filed, once licensed, the licensee will have to file reports indicating system base stations and channels employed at the base stations at the 4, 6, and 10-year benchmarks for nationwide licensees and at the 2 and 5-year benchmarks for regional licensees. We will assign the call signs to individual stations at that time. *See* para. 47 *infra.*

[56] Any future change in the filing fee for an FCC Form 574 will result in a corresponding change in the filing fee for a national license.

[57] Although each nationwide filing will be, in terms of substance and processing, the equivalent of 1,400 separate applications, we will accept one FCC Form 574. The single form must include all information specified. The filing of a single Form 574 is merely for convenience for the applicant. The Commission will assign separate file numbers and, if granted, separate call signs for each of the 1,400 applications the single Form 574 filing represents.

[58] Any future change in the filing fee for an FCC Form 574 will result in a corresponding change in the filing fee for a national license.

some adjustment should be made to our fee in instances where the applicant already has some 900 MHz SMR presence.

(c) Licensee Selection

26. *Proposal.* In the *Notice* we proposed that any nationwide applications filed on the same day be considered mutually exclusive. In the case of mutually exclusive applications we proposed to select the licensee by lottery pursuant to Section 1.972 of our Rules, 47 C.F.R. § 1.972.[59] We proposed that no preference be given to existing Phase I licensees and that the Commission assign nationwide channels.[60]

27. *Comments.* Millicom is the only commenter supporting use of a comparative hearing rather than a lottery to choose among mutually exclusive nationwide licensees.[61] As discussed previously, RAM suggests that a preference be given to applicants proposing to use digital technology and that applicants be required to have an existing 900 MHz presence in at least 30 of the 46 DFAs and at least 8 of the top ten markets.[62] RAM also suggests that applicants specify the channels they desire, while Millicom agrees with the *Notice* that the Commission should assign the channels.[63]

28. *Further Proposal.* We propose three 20-channel blocks for the nationwide licenses and six 20-channel blocks for the regional licensees. We believe that it would promote the efficient development of service to restrict initial license eligibility for nationwide licenses to existing 900 MHz licensees that have established a substantial presence in Phase I markets. We propose to define an applicant with a substantial 900MHz presence as an SMR operator with a presence in 20 of the 46 Phase I DFAs.[64] The presence must be established as of the date of this item's adoption. We propose that a presence may be established directly through holding a license in the applicant's name,[65] or through an *exclusive* management agreement with a 900 MHz SMR licensee.[66] We also ask for comment on the implications of defining presence to include such management agreements.

29. An eligibility restriction would further the public interest by expediting provision of nationwide SMR service. Existing 900 MHz operators have developed the infrastructure that could form the backbone of a nationwide network, and through these efforts, they have obtained uniquely valuable operational experience with 900 MHz equipment. Moreover, an initial eligibility restriction would promote spectrum efficiency and technological innovation because existing licensees could pool their existing channels with the newly authorized nationwide channels, permitting greater frequency reuse and higher capacity for end-users. On the basis of our public interest findings here we find that *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945), does not preclude this eligibility restriction.[67] WeCrequest comment on all aspects of the initial restriction on eligibility, including whether a presence in 20 of the 46 Phase I DFA's should be regarded as a substantial presence, and whether the public interest in expediting nationwide 900 MHz SMR service will best be realized through an initial restriction on eligibility.

30. We also request comment on whether an initial restriction on eligibility should be placed on applications for regional and local 900 MHz SMR licenses. There may be some compelling arguments to be made in favor of providing an opportunity for existing "local" licensees with constructed, operational and fully loaded systems to expand prior to accepting applications from any other eligible entities. In this regard, we note that the RAM proposal discussed previously (*see* para. 17) also seeks to give existing licensees an opportunity to expand their systems on spectrum not initially available to general applicants. Accordingly, we seek comment on whether the public interest would be served by such an initial restriction on eligibility for either regional or local applicants. In addition, with respect to regional licenses, we request comment on the most workable criteria to determine a substantial presence in a region, assuming we decide to impose an initial restriction on eligibility for regional licenses. For example, we could define a substantial presence for regional licensing purposes as a licensee with a presence in all DFAs within a region.

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[59] *Notice*, 4 FCC Rcd at 8680.

[60] *Id.* at 8675 and 8680.

[61] Millicom comments at 23.

[62] RAM comments at 25-35.

[63] Millicom comments at 14-15. RAM comments at 11-12.

[64] A presence in 20 DFAs represents a presence in nearly half of the total 46 DFAs.

[65] We also propose to credit towards establishing such a presence an application to assign a 900 MHz SMR license, or a 900 MHz SMR application filed by the successful recipient of a finder's preference, provided that: 1) applications of these types are pending as of the date of this item's adoption, and 2) the pending applications are ultimately granted.

[66] In the event that a particular SMR station is subject to conflicting claims regarding credit towards the initial restriction on nationwide eligibility, we propose to resolve such conflicts as follows: 1) between a licensee claiming the SMR station and an entity claiming an exclusive management agreement, we will credit the licensee; 2) between two or more entities claiming exclusive management contracts, we will not credit any of the entities.

[67] *See also* United States v. Storer Broadcasting Co., 351 U.S. 192 (1956) (hearing requirement in 47 U.S.C. § 309 does not limit the Commission's power to establish license eligibility criteria). The Commission exercised this authority in An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems, 86 FCC 2d 469, 483 (1981) (restricting license eligibility for a block of cellular radio frequencies to wireline telephone carriers for a number of years), *modified*, 89 FCC 2d 48, 69-77 (1982) (further limiting wireline set aside period), *further modified in* Amendment of the Commission's Rules to Allow the Selection from Among Mutually Exclusive Competing Cellular Applications Using Random Selection or Lotteries Instead of Comparative Hearings, 98 FCC 2d 175, 194-98 (1984) (reaffirming eligibility criteria, but redefining set aside periods for each market), *modified on other grounds*, 101 FCC 2d 577 (1985);Second Report and Order/Further Notice of Proposed Rule Making, Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, 7 FCC Rcd 3340, 3342-43 (1992) (limiting initial eligibility for Advanced Television frequencies to existing broadcasters), *recon.*, Memorandum Opinion and Order/Third Report and Order/Third Further Notice of Proposed Rule Making, MM Docket No. 87-268, FCC 92-438, released October 16, 1992, at paras. 3, 6, 8 n.9 (reaffirming eligibility restriction); *cf.* Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services, 6 FCC Rcd 3488 (1991), *recon. granted in part*, 7 FCC Rcd 1808 (1992), *further recon. pending*, (establishing a dispositive "pioneer's preference" for developers of new or innovative communications services).

31. We tentatively conclude that nationwide and regional licensees will be selected pursuant to a lottery.[68] We propose to limit each applicant to a single application for a nationwide application. Under our proposal no applicant will be awarded more than one nationwide license. We propose that applicants for a regional license be limited to two applications per region. Under our proposal, the maximum number of regional licenses an entity can have an interest in is two per region, unless the entity has an interest in a nationwide license in which case the entity can only have an interest in one regional license per region (*see* para. 18, *supra.*). Applications not selected in their applicable lottery will be dismissed. We propose to permit applicants to specify which channel block they prefer.[69] If possible, we will satisfy a winning applicant's request for a specific channel block; otherwise, we regard these channels as fungible and will award whatever block is available.

(d) Construction Requirements

32. *Proposal.* In the *Notice* we proposed to require that a nationwide licensee construct and operate at least one base station in at least 50 of the urbanmarkets listed in Appendix B, and that a minimum of three (3) channels would need to be constructed in an urban market to satisfy the construction requirements.[70] We proposed a 10-year construction period, with benchmarks at the second, fourth, and sixth years, by which times a licensee would be required to have constructed at least 10, 40, and 70 percent of its proposed stations, respectively. If a licensee failed to meet any of the construction benchmarks, it would lose all rights to the nationwide channels.[71] We proposed that transfers and assignments not be allowed until after the four-year benchmark.[72] Additionally, we proposed a ten-year license term[73] and proposed that no loading requirement be imposed on nationwide licensees.[74]

33. *Comments.* NABER and ASNA both generally express support for our proposed construction requirements.[75] Millicom and RAM, however, both support stricter construction requirements.[76] With the exception of Millicom, commenters argue that our proposal that a licensee lose all rights to the nationwide channels for failure to meet any of the construction benchmarks is0unduly harsh and does not serve any public benefit.[77] Millicom argues that such a stringent penalty is necessary to deter speculative applications for the nationwide licenses.[78] Commenters generally support some ban on assignments of license, with some commenters supporting a strict ban within the first four years. Others suggest allowing assignments immediately upon construction of a minimum number of stations.[79]

34. *Further Proposal.* Implementation of a nationwide system is a major financial, logistical, and technological undertaking. Nationwide licensees, therefore, must have adequate time to construct such systems. We would prefer to give licensees sufficient time to implement well-designed systems rather than attach importance to rapid construction. Our proposed construction schedule incorporates benchmarks to ensure that a licensee will construct in a timely manner. Accordingly, we tentatively conclude that we will adopt our proposed ten-year construction schedule for nationwide licenses except that a licensee will not have to meet the proposed two-year/10 percent construction requirement. We believe that three benchmarks are sufficient to ensure timely use of the spectrum.

35. Considering the value and potential of a nationwide license we agree with commenters that our proposed 50 market minimum construction requirement is insufficient.[80] We therefore propose that the minimum number of markets in which a licensee must construct stations be increased to 70 markets. Accordingly, we propose that a nationwide licensee must construct in at least 70 markets within 10 years, in at least seventy (70) percent

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[68] While we consider selection via lottery to be the best tool currently available to the Commission for licensing these new 900 MHz systems, competitive bidding may be an alternative mechanism. The Commission lacks current authority to license pursuant to competitive bidding. If Congress enacts legislation authorizing the Commission to license pursuant to competitive bidding on before we take final action in this proceeding, we may consider amending the selection procedures we have prescribed herein. If Congress fails to authorize competitive bidding prior to our final action, we will retain the selection procedures proposed in this item, and will issue a public notice announcing the first filing window.

[69] RAM proposed that we allow a nationwide licensee to specify different ten-channel blocks in different areas of the country. We are, however, not inclined to propose this because it would be too difficult to administer. A nationwide licensee will, however, be able to count any stations they are operating, at the time they file their nationwide application, on any 900 MHz channels towards meeting their construction requirements regardless of which channels those stations are operating on. We also decline to require frequency exchanges either between nationwide licensees or between nationwide licensees and local licensees. While we encourage such frequency exchanges and provide for them in our Rules (*see,* existing 47 C.F.R. § 90.645(h)), we do not believe it is necessary or appropriate to require such exchanges.

[70] *Notice,* 4 FCC Rcd at 8676

[71] *Notice,* 4 FCC Rcd at 8678.

[72] *Id.* at 8679.

[73] *Notice,* 4 FCC Rcd at 8677. Currently, in accordance with 47 C.F.R. § 90.149 the license term in the private land mobile services is generally five years. 47 U.S.C. § 307 of the Communications Act of 1934, as amended, permits land mobile licenses to be authorized for up to ten years.

[74] *Notice,* 4 FCC Rcd at 8678. NABER is the only commenter that supports requiring loading standards. While NABER indicates that our current loading standards are inappropriate for national use, it does not, however, suggest any alternate standard. *See* NABER comments at 14. We believe that no loading standards are necessary. With the stringent construction requirements we are implementing, a licensee will, by economic necessity, have a strong incentive to load its system. National systems, therefore, will not be subject to any loading standards.

[75] NABER comments at 15-16. ASNA comments at 12.

[76] Millicom comments at 13-14 and at 20. RAM comments at 8-10.

[77] ASNA comments at 14-16. Motorola reply comments at 7. RAM comments at 15-16.

[78] Millicom reply comments at 15.

[79] Millicom comments at 21. NABER comments at 16. ASNA comments at 14. RAM comments at 21-23. RAM also requests that we clarify our policy regarding national license assignments that would be incidental to the sale of other facilities, mergers, and other transactions. Currently, the incidental assignment of land mobile licenses constituting a portion of a larger business transaction is handled on a case-by-case basis. Because of the individual nature of such transactions, we decline to herein adopt a rule specifically addressing this issue and will continue to process such assignments on a case-by-case basis.

[80] *Notice,* 4 FCC Rcd at 8676.

(49) of these markets within six years, and in at least forty (40) percent (28) of these marketswithin four years. To satisfy the construction requirements we propose that a nationwide licensee must construct, within the first four years, in 28 of the markets in Section 90.741 of our Rules.[81] The other 42 markets identified for construction would not have to be from among the markets listed in Section 90.741. For systems to be considered serving different markets we propose that the coordinates of any two base station transmitters must be separated by more than 40 miles from one another. If the coordinates of the base station transmitters are separated by less than 40 miles the licensee would only be permitted to count the area served by the transmitters once. This is a more flexible approach than our proposal to require that *all* systems counted toward fulfillment of the construction requirements be in markets listed in Appendix B of the *Notice* and should make it easier for a licensee to construct systems that satisfy users' needs. This approach should also minimize the possibility of a nationwide licensee being compelled to construct transmitter sites in areas they do not intend to fully serve just to meet our construction requirements rather than to meet consumer demand. It should also encourage channel reuse in smaller markets and rural areas by allowing systems in such areas to be counted toward fulfilling our construction requirements. We propose to allow a licensee to assign its license after meeting the 40 percent construction requirement even if this occurs earlier than four years after initial licensing. The new licensee would be held to any of the remaining benchmarks of the nationwide licensee. To avoid creation of a speculative market and prevent the erosion of the nationwide license, we tentatively conclude that partial assignment of a nationwide license will not be permitted at any time, even after full construction. Licensees would, however, be permitted to lease use of excess spectrum at facilities constructed by either the licensee or the lessee. Permitting a nationwide licensee to lease excess system capacity will permit existing Phase I licensees the opportunity to expand an existing system pursuant to an agreement with the nationwide licensee provided the licensee retains control of system operations.

36. We tentatively conclude that we will adopt our proposal that, if a licensee fails to meet any of the aforementioned benchmarks it will automatically lose all its licenses *e.g.* all licenses on nationwide channels and its frequencies will be assigned to a new nationwide licensee. As stated previously, (*see* paras. 10-14, *supra*) we believe that there are numerous benefits to licensing this spectrum on a nationwide basis. Accordingly, we will require that the nationwide licenses be kept intact. It would be inconsistent to allow a nationwide licensee that perhaps could have intended, from the beginning, to construct in only 28 markets, to retain its constructed stations and to dissolve the remaining portion of its nationwide license into local systems when we are attempting to promote the most efficient use of spectrum by licensing systems on a nationwide basis. While a licensee may subcontract with another entity to construct and operate in a given market and remain responsible for ensuring that use of the licensed spectrum complies with Part 90 of our Rules, the actual operator of any system is not relieved of all responsibility to comply with our Rules and is also subject to forfeitures under Section 503 of the Communications Act, 47 U.S.C. § 503, other administrative sanctions, and criminal prosecution.[82]

37. Our proposal indicated that construction in any markets designated in the Appendix required construction of one base station operating with at least three channels.[83] Upon further review, however, we believe that this is insufficient to ensure that the constructed facilities are capable of realistically serving users and that all the licensed channels are being used. We are, therefore, proposing a minimum service area requirement and, in view of the fact that a nationwide licensee will be assigned 20 rather than 10 channels as proposed, modifying our proposed minimum channel requirement somewhat. We propose that, for construction in a given market to count toward the minimum construction requirements, at least five channels must be placed in operation.[84] For any of the ten markets Tlisted in the Table in Section 90.725(h) to count toward the minimum construction requirements, however, we propose that all twenty channels must be placed in operation.[85] Implementation of this requirement is appropriate given the established need for spectrum in these top markets. Additionally, in order to count toward the minimum construction requirements, a station (or stations) would have to serve the equivalent of a circular area with a diameter of at least 64 km (40 miles) (3217 sq. km (1243 sq. mi.)).[86] One or more stations could be used as long as the entire area is covered. We note that, licensing systems on a nationwide basis further reduces the likelihood for

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[81] For consistency we have modified the proposal in the *Notice* that would have required construction in markets listed in Appendix B of the *Notice*. The list of markets in Section 90.741 is the list used to fulfill construction requirements for nationwide licensees in the 220-222 MHz band. *See* 47 C.F.R. § 90.725. This will avoid confusion in the future and avoid publication of a second list of markets.

[82] This issue is similar to the situation with SMR licensees and their end users. *See* Report and Order, PR Docket 92-79, released August 31, 1992, 7 FCC Rcd 5558 (1992).

[83] *Notice*, 4 FCC Rcd at 8676.

[84] To be considered placed in operation a trunked station must have two or more associated mobile units operating. Accordingly, a station providing only fixed services will not be counted toward meeting our construction requirements. *See* our discussion on the term placed in operation in the Report and Order in PR Docket 90-481, 6 FCC Rcd. 7297 (1991).

[85] 47 C.F.R. § 90.725(h). RAM argues that we should not adopt a requirement for a minimum number of operational channels. RAM comments at 17, nt. 12. We find that ensuring use of licensed spectrum by requiring a minimum number of channels in some markets is not unreasonable and ensures some minimal use of the spectrum. Additionally, the licensee does not have to construct the minimum number a channels at each site, the channels can be divided between multiple sites that comprise a system. RAM also proposes tailoring channel construction requirements to meet the communications needs of each individual market. RAM comments at 17, nt. 12. Implementation of a multi-tiered arrangement as suggested by RAM would, however, be burdensome to administer.

[86] We consider the service area of a station to be the area within the 40 dBu contour as calculated using the Commission's R6602 F(50,50) curves with a 9 dB correction factor for mobile antennas. Multiple stations, however, may cause the total service area to be other than circular. *See* the *Second Report and Order*, Docket 18262, 46 FCC 2d 774 (1974). *See also* 47 C.F.R. § 90.635(b) and (c).

co-channel interference and the need for station identification. Accordingly, we propose that, if nationwide licensing is adopted, stations operating on 900 MHz channels licensed on a nationwide basis would not be required to transmit a station identifier. We request comments on our proposal to exempt 900 MHz systems licensed on a nationwide basis from transmitting a station identifier.

38. To ensure that a regional licensee does not allow spectrum to lie fallow we are also proposing certain minimum construction requirements that must be met at the 2 and 5-year benchmarks from the time the license is granted. We are proposing minimum construction requirements for regional licensees similarto those proposed for nationwide systems.[87] Thus our proposal is to require licensees to provide service to at least 10 markets within each RBOC region. As with nationwide licenses, for purposes of fulfilling the 10 market construction requirement we propose that the coordinates of any two base station transmitters must be separated by more than 40 miles from one another in order to be considered different markets (*see*, para. 35, *supra.*). We also propose a definition of providing service that is consistent with that adopted for nationwide licenses.[88] This includes construction of a minimum number of channels and coverage over a minimum area. Consistent with our proposal for nationwide licenses, we propose that a regional licensee be required to place at least 5 channels in operation for the market to count toward completion of the construction requirements and that all 20 channels be placed in operation in any of the top ten markets listed in the Table in Section 90.725(h), 47 C.F.R. § 90.725(h). Additionally, in order to count toward fulfillment of the minimum construction requirements a station (or stations) must serve the equivalent of a circular area with a diameter of at least 64 km (40 miles) (3,217 sq. km (1243 sq. mi.)).[89] We propose that a regional licensee be required to construct 40 percent of its system within 2 years from the date the license is issued.

39. Some commenters may find that the minimum construction requirements we have proposed for regional licenses are not rigorous enough to ensure use of the spectrum. As an alternative, we propose to require each regional licensee to, at the close of the fifth year after license grant, serve either 80 percent of the land area or 80 percent of the population of the licensed region with a signal strength of at least 40 dBu. We also propose that a minimum of ten transmitters be constructed and in operation in each region. Under this alternative we also propose that licensees be required to meet an intermediate construction benchmark at two years from the date the initial license is granted. At the two-year benchmark, we propose, that the licensee be required to provide service to at least 40 percent of either the land area or the population of the region for which they are licensed, or the regional license will cancel automatically. Commenters should provide as much detail as possible to support their position on#either of our proposals or on any alternative construction or interference criteria they believe would be appropriate.

40. While we tentatively conclude that our benchmark approach to regional and nationwide licenses will, in all likelihood, assure that the applicant carries out its commitment to construct and or operate the system, we propose an alternative that may better achieve this end. Specifically, we propose to require applicants for nationwide and regional licenses not only to submit a construction plan, but, as a condition of license grant, obtain a performance bond in the amount of $50,000 for each base station facility, or a total of $3.5 million for a nationwide system.[90] We propose that individual licensees be able to choose the form of the performance bond. Licensees could either purchase a separate $50,000 bond for each base station or could choose to have cash placed in an interest bearing escrow account.[91] If we adopt a performance bond the licensee would still be required to complete construction within the ten year timeframe, but would progressively be refunded a portion of the bond upon complete construction of each base station pursuant to the applicant's construction schedule. Failure of an applicant to timely construct pursuant to the construction schedule would trigger automatic cancellation of the nationwide or regional license and forfeiture of the bond's remainder. The performance bond concept would serve as an incentive to the licensee to make productive use of the spectrum resource, and, in the event that the licensee fails to timely construct, the performance bond serves as a mechanism whereby the public is compensated for the spectrum being encumbered in a way that is not beneficial. We ask for comment on the legal justification for requiring the posting of a performance bond as a condition of license grant, whether the amount of the proposed bond reasonably relates to the loss that would be suffered by the public in the event the licensee fails to construct, and whether the performance bond provides a better means of ensuring that the licensee will put the spectrum to use in a manner consistent with the public interest. We also ask for comment whether the bond should instead correspond to the actual cost of a fully constructed SMR nationwide system, and if so, we seek data to be included in the record that would reliably project such costs.

41. To limit co-channel interference between adjacent regions we propose that the signal strength at the boundary of a licensee's region not exceed 30 dBu.[92] We propose that no adjacent channel interference standards be adopted. Licensees will be expected to coordinate use both within a region and at the border of the regions to avoid actual co-channel and adjacent channel interference. In the alternative, we request comment on whether we should have no co-channel interference standards between regional licensees. In this case the regional licensees would bear all responsibility for coordinating with their co-channel neighbors and resolving any co-channel interference problems.

42. Consistent with our proposals for nationwide licenses, we propose that regional licenses be permitted to assign a regional authorization upon satisfying the 40 percent construction requirement. We propose that partial

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[87] *See* para. 33, *supra*.

[88] *See* para. 35, *supra*.

[89] *Id.*

[90] *Cf.* Teleprompter Corp., 12 FCC 2d 936 (1968), 47 C.F.R. § 22.917(g)(1).

[91] *Cf.* Aeronautical Radio, Inc. v. FCC, 928 FCC 2d 428 (D.C. Cir. 1991). Fifty thousand dollars is our initial estimate of the loss to the public that will occur as a result of a licensee's failure to construct.

[92] Signal strength at the boundaries would be calculated using the Commission's R6602 F(50,10) curves with a 7 dBu correction factor for mobile use.

assignments not be permitted at any time. We request comment on all aspects of our construction proposals and channel interference criteria.

(e) License Modifications

43. *Proposal/Comments.* The *Notice* contemplated a nationwide licensee employing standard procedures to modify its license when adding stations. RAM, however, proposes that nationwide licensees be exempt from filing an application each time a station is added to the nationwide system.[93]

44. *Further Proposal.* Although we agree with RAM that nationwide licensees require great flexibility to quickly construct and modify stations and that this flexibility would be greatly enhanced by permitting the nationwide licensee to add or modify facilities without prior authorization from the Commission, we have to balance this flexibility with the Commission's need to maintain an accurate database to track channels and facilities. Accordingly, while we intend to require individual sites to be licensed, we propose that nationwide and regional licensees, in most instances, not be required to file an application prior to the construction of each individual site.[94] Instead, nationwide licensees in the 900 MHz service would be required to individually license constructed facilities when they file progress reports at the 4, 6, and 10-year benchmarks.[95] Regional licensees will be required to license new facilities or modify the licenses of existing facilities at the 2-year benchmark, at 5 years when the minimum construction requirements must be fulfilled, and at the 10-year license renewal period.[96] After the initial 10-year license term, licensees would be required to license any new sites at the time of renewal of their nationwide or regional license. Although we do require nationwide licensees in the 220-222 MHz band to file an application each time a facility is constructed or modified, we believe that such a requirement is not appropriate in the 900 MHz nationwide and regional service. Nationwide licensees in the 900 MHz service will have a minimum of 20 channels and regional licensees will have a minimum of 40 channels. If this policy is adopted, nationwide and regional licensees in the 900 MHz service would, however, still be required to file individual applications *prior* to adding or modifying facilities in instances where special coordination and processing are required, such as: 1) facilities that are in the vicinity of certain receiving locations,[97] 2) facilities that may have a significant environmental impact,[98] 3) facilities that require notification to the Federal Aviation Administration,[99] 4) facilities that require coordination in accordance with an international treaty because of the facility's proximity to United States borders, 5) facilities that are located closer than the co-channel separation requirements of Section 90.621.[100]

(2) Existing Secondary Sites of Phase I Licensees

45. Although the issue was not raised in the *Notice*, Motorola, in its comments, expressed concern about licensees in the Phase I DFAs that constructed secondary sites in order to respond to a perceived demand for wide-area service. Motorola proposes that Phase I licensees' secondary sites, whether inside or outside the DFA, be granted primary status, provided that the primary station is loaded to 70 mobiles per channel.[101] NABER, RAM, ASNA, and Fleet Call filed reply comments supporting Motorola's position.[102] Millicom opposes granting primary status to the secondary sites of Phase I licensees, arguing that doing so would defeat the purpose of the Phase I licensing plan.[103]

46. The Commission's intent behind creating a multiphase licensing scheme for the 900 MHz SMR spectrum was to expedite service to areas most in need of it.[104] In PR Docket 92-17 we recognized that our licensing scheme may have made it difficult for licensees to provide complete service over an entire region and that the limitations on licensing during Phase I may have made it difficult for a 900 MHz licensee to effectively compete with its 800 MHz counterparts.[105] Licensees constructing secondary sites have pursued the only avenue available to them in attempting to satisfy perceived demand for wide-area service within and around the DFAs. Such licensees have attempted to fulfill the Commission's desire that areas in need of expedited service do, in fact, receive such service. Accordingly, we propose that all secondary sites licensed as of the date of adoption of this item be given primary status provided that the licensee's primary site was constructed and in operation as of the date of adoption of this item. We request comments on this proposal.

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[93] Ram comments at 18.

[94] This is analogous to our temporary licensing procedures where an applicant for a private land mobile station license utilizing an already authorized facility may operate for a limited time in advance of obtaining a license grant. *See, generally* 47 C.F.R. § 90.159(a).

[95] Filing fees for licensing facilities at the 4, 6, and 10 year benchmarks and at the time of license renewal will, of course, be consistent with statutory requirements. Accordingly, the filing fee for a renewal application will be on a per call sign basis and would, therefore, be equal to the sum of the number of channels at each site multiplied by the statutory filing fee in effect at the time of renewal. At the time of renewal the Licensing Division will assign call signs for each channel to any new facilities added since the last renewal. The initial fee paid at the time the application is filed will be applied toward the first 1,400 applications.

[96] As with nationwide authorizations, regional licensees will have to submit filing fees consistent with statutory requirements for licensing regional facilities at the 2 and 5-year benchmarks and at the time of license renewal. The filing fee and the benchmarks and for a renewal application will be the sum of the number channels at each site multiplied by the statutory filing fee in effect at the time of renewal. At the time of renewal the Licensing Division will assign call signs to any new facilities added since the last renewal. The initial fee paid at the time the application is filed will be applied toward the first 400 applications.

[97] *See* 47 C.F.R. § 90.177.

[98] *See* 47 C.F.R. §§ 1.1307, 1.1312.

[99] *See* 47 C.F.R. § 17.7.

[100] 47 C.F.R. § 90.621. Nationwide and regional licensees will be required to afford co-channel protection to existing Phase I licensees as required under Section 90.621(b) of the Rules, 47 C.F.R. § 90.621(b).

[101] Motorola comments at 2-11 and reply comments at 3-6.

[102] NABER reply comments at 3-4. ASNA reply comments at 2-6. RAM reply comments at 6-7. Fleet Call reply comments at 3-6.

[103] Millicom reply comments at 28-30.

[104] *See* Report and Order, Gen. Docket No. 84-1233, 2 FCC Rcd 1825, 1831 (1986).

[105] *See* nt. 9, *supra*.

B.Report and Order

47. Several issues addressed in this proceeding are independent of 900 MHz licensing issues. Accordingly, we are able to take action on them without requesting additional comment.

(1) Station Identification

48. *Proposal/Comments:* RAM raises the issue of station identification, requesting that nationwide licensees be exempt from the station identification requirements of Section 90.647(b) of our Rules.[106] This provision requires trunked systems to employ a device that automatically transmits the station call sign every 30 minutes either by voice or by International Morse Code. RAM argues that a voice or Morse Code identifier "can impede the mechanisms by which mobile units receive digital transmissions from multiple base station sites to determine the appropriate base station with which to communicate."[107] RAM also cites the Commission's proposal to exempt nationwide licensees operating in the 220-222 MHz band from any station identification requirement.[108]

49. *Decision:* The periodic transmission of a station identification is required to assist in identifying a source of interference. We do, however, recognize that it could be disruptive to the operation of a station that normally transmits digital signals to break every 30 minutes to transmit a voice or Morse Code identification. In the case of stations that are licensed on an exclusive basis and are, therefore, unlikely to cause co-channel interference, there is considerably less need for the Commission to be able to monitor for a station's identifier than in the case of shared channels. Accordingly, stations operating on either 800 MHz or 900 MHz channels, licensed on an exclusive basis, that normally employ digital signals for the transmission of data, text, control codes, or digitized voice may transmit a station identifier by digital transmission of the call sign.

(2) Fixed Use

50. *Proposal.* We proposed to allow fixed use on 900 MHz SMR channels on a co-primary basis with mobile operations in rural areas.[109] As pointed out in the *Notice* as well as in API's petition, ample spectrum exists for mobile systems in rural areas.[110] API's petition, however, points to a shortage of spectrum for fixed operations.[111] By proposing co-primary fixed use we sought to relieve this demand for additional spectrum for fixed operations and to give SMR operators greater flexibility to provide a wider variety of services. To ensure, however, that fixed operators didn't preclude mobile operations by quickly obtaining all the spectrum, we proposed a 36-month period in which mobile SMR operations could develop before fixed use would be authorized on a primary basis.[112] We also requested comments on whether our current measure of spectrum use, the mobile loading requirements of Section 90.631, should be modified to include use by fixed operations.[113]

51. *Comments.* A number of commenters expressed general support for our proposal to allow co-primary fixed operations.[114] RAM, NABER, and ASNA state, however, that our proposal to designate fixed use as co-primary to mobile operations on SMR channels is unnecessary.[115] They argue that because licensees have exclusive use of these channels and fixed operations are currently permitted on a secondary basis, licensees are now able to provide fixed service to their customers. Relatedly, Millicom recommends that licensees be permitted to count fixed stations in meeting their channel loading requirements.[116] NABER, on the other hand, argues that no change in our definition of loading is necessary.[117]

52. *Decision.* Our proposal to allow fixed operations on a co-primary basis with mobile operations stems from a desire to give SMR operators the flexibility to fully serve their customers' communications needs and to allow marketplace demands to determine the most effective use of this spectrum.[118] Our goal can be satisfied, however, without specifically designating fixed use as co-primary to mobile use. As pointed out by several commenters, Section 90.637(c)[119] currently allows trunked SMR licensees to provide fixed service on an ancillary basis.[120] Because 900 MHz SMRs are licensed on an exclusive basis it is not necessary for the Commission to redesignate such use as co-primary. A licensee is free to designate any number of its channels for fixed use, or it may combine fixed and mobile operations on its channels.[121] Because this spectrum is allocated for mobile use with fixed use being secondary,

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106 47 C.F.R. § 90.647(b).

107 RAM comments at 20-21.

108 RAM comments at 21. *See 220 MHz*, 4 FCC Rcd at 8609.

109 *Notice*, 4 FCC Rcd at 8677. This proposal addresses issues raised in a petition filed by the American Petroleum Institute (API) in which API requested that we reallocate the 200 SMR channels in areas outside the 100- mile radius of each of the 50 top markets to fixed operations. *See* Petition for Rule Making, Amendment of Parts 2 and 94 of the Commission's Rules to Allocate Spectrum in the 896-901 and 935-940 MHz Frequency Bands for Multiple Address System and Point-to-Point Operations, RM 6579, October 27, 1988. The Private Radio Bureau, however, dismissed the petition as premature. Order, Amendment of Parts 2 and 94 of the Commission's Rules to Allocate Spectrum in the 896-901 and 935-940 MHz Frequency Bands for Multiple Address System and Point-to-Point Operations, *(Order)* 4 FCC Rcd 4979 (Private Radio Bureau, 1989). API filed an Application for Review of the Bureau's action on July 20, 1989.

110 *Notice*, 4 FCC Rcd at 8677.

111 *Order*, 4 FCC Rcd at 4979

112 *Notice*, 4 FCC Rcd at 8677.

113 *Notice*, 4 FCC Rcd at 8678.

114 Utilities Telecommunications Council (UTC) comments at 3-4. API comments at 4-9. Central Station Alarm Association/Alarm Industry Communications Council (CSAA/AICC) comments at 5-10. SIRSA comments at 3-5. AMI comments at 16. Johnson comments at 3-4. Millicom comments at 17-20.

115 RAM comments at 23-25. NABER comments at 19-20. ASNA comments at 16-19.

116 Millicom comments at 19. Millicom does not offer a specific method of counting fixed use.

117 NABER comments at 20.

118 *Notice*, 4 FCC Rcd at 8677.

119 47 C.F.R. § 90.637(c).

120 RAM reply comments at 8-10. NABER comments at 19-20. ASNA comments at 16-19.

121 Although this spectrum is allocated for mobile use, we do not recover channels from licensees not serving a minimum number of mobile units unless all channels in the licensees area have been assigned. *See* 47 C.F.R. § 90.631(b). Thus, a licensee can satisfy our construction requirements by constructing a permanent facility that serves very few mobile units. The remaining capacity could then be used for fixed operations.

however, it would be inappropriate to allow fixed stations to be used in meeting channel loading requirements, and we will not do so.

(3) Construction and Placed in Operation Requirements

53. *Proposal.* In the *Notice* we addressed the issue of SMR licensees undermining our construction and placed in operation requirements by installing a "base station on wheels."[122] We have received reports that some licensees have placed "mobile" base stations in operation on the day the station's construction requirement had to be met and then discontinued the station's operation or moved the station elsewhere. As stated in the *Notice*, this does not fulfill the construction requirement of Section 90.631(f),[123] which requires that an SMR station be constructed and placed in *permanent* operation.[124] To limit the construction of such facilities, we proposed to clarify our construction policy by requiring stations to be in continuous operation after the required date of construction: if operations are discontinued for more than thirty (30) consecutive days the license will cancel automatically.[125]

54. *Comments.* Commenters express support for our efforts to clarify and enforce our construction requirements,[126] but are concerned that our proposal would be too strict and could result in legitimate licensees losing their license. The Ad Hoc Committee and Fleet Call recommend an alternative proposal that would allow an initial period of inoperation of sixty days.[127] ASNA, RAM, and NABER believe that the wording of the proposed rule should be modified to prevent cancellation of a license due to minor discrepancies between the authorization and the actual facility.[128] NABER believes that we should re-examine our definition of "operational."[129]

55. *Decision.* Our goal is to ensure that SMR licensees construct and operate the facilities for which they are licensed, rather than establish temporary operations for brief periods.[130] As pointed out by commenters, legitimate reasons may exist for a licensee to discontinue operations for a period in excess of thirty days.[131] Accordingly, we are modifying our proposal so that an SMR license will cancel automatically if the licensee discontinues operation for a period in excess of 60 consecutive days and fails to file written notification of the discontinuance with the Commission. Such notification must include the reason for discontinuance and the anticipated duration of the discontinuance. The Commission may, in its discretion, reject the licensee's reason for prolonged discontinuance. In this case the Commission will notify the licensee. If the licensee does not resume operations within 5 days of the receipt of the rejection notice, the SMR license cancels automatically. Our current Rules regarding construction should otherwise be sufficient to disallow temporary operations or the "base station on wheels." A station must be permanently constructed in accordance with the technical parameters of its license and must be placed in operation in accordance with our Rules.[132] In accordance with our existing policy, if a facility is not in substantial conformance with the technical parameters of its license, the licensee must file to modify its license.[133]

IV. CONCLUSION

56. In this proceeding we have examined the development of the 900 MHz SMR service and have noted the numerous changes that the SMR industry is currently undergoing. We have adopted rules that will give licensees greater flexibility when transmitting a station identifier and will ensure that spectrum is used. We have also set forth proposals that will assist the 900 MHz SMR industry to establish itself as an industry distinct from the 800 MHz SMR industry. Because of the relative lack of contamination in the 900 MHz band the 900 MHz SMR service presents an ideal opportunity to promote the development of innovative technologies through nationwide and regional networks. The rules we are proposing will promote an industry better able to serve the public interest by providing the flexibility necessary for the industry to more responsive to market forces and to satisfy a wide range of user needs. As the communications industry advances it is important that we keep pace with the industry and provide the means for further advancement. The policies we are proposing and the rules we have adopted in this proceeding will go far toward achieving this goal.

V. PROCEDURAL MATTERS

Regulatory Flexibility Analysis

57. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared a Regulatory Flexibility Analysis (RFA) of the expected impact on small entities of the proposals suggested in this document. The RFA is set forth in Appendix B. Written public comments are requested on the RFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Further Notice, but they must have a separate and distinct heading designating them as responses to the Regulatory Flexibility Analysis. The Secretary shall send a copy of this Further Notice of Proposed Rule Making, including the Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq* (1981).

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122 *Notice*, 4 FCC Rcd at 8678.
123 47 C.F.R. § 90.631(f).
124 *Notice*, 4 FCC Rcd at 8678.
125 *Id.*
126 NABER comments at 20. ASNA comments at 19-20. Ram comments at 19. Fleet Call reply comments at 7-8. Ad Hoc Committee of Specialized Mobile Radio Operators (Ad Hoc Committee) reply comments at 1-2.
127 Ad Hoc Committee reply comments at 3-8. Fleet Call reply comments at 7-10.
128 ASNA comments at 19-22. Ram reply comments at 7-8. NABER comments at 20-23.
129 NABER comments at 20-22.
130 *Notice*, 4 FCC Rcd at 8678.
131 Ad Hoc Committee reply comments at 3-8. Fleet Call reply comments at 7-10.
132 *See* 47 C.F.R. § 90.631(e) & (f).
133 *See* Report and Order, PR Docket 90-481, 6 FCC Rcd 7297, 7299 (1991) at para. 9.

Ex Parte Rules - Non-Restricted Proceeding

58. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

Comment Dates

59. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before April 23, 1993, and reply comments on or before May 10, 1993. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Records Center of the Federal Communications Commission, Room 239, 1919 M St., N.W., Washington, D.C. 20554.

VI. ORDERING CLAUSES

60. Accordingly, IT IS ORDERED that, pursuant to Sections 4(1), 303(g), 303(r) and 331(a) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303(g), 303(r), and 332(a), Part 90 of the Commission's Rules is AMENDED effective [30 days from publication in the Federal Register], as set forth in Appendix C.

61. Additionally, IT IS ORDERED that American Petroleum Institute's Application for Review, filed July 20, 1989, of the Bureau's June 9, 1989 action, 4 FCC Rcd 4979 (1989), is granted to the extent indicated herein and otherwise is DENIED.

62. For further information concerning this Report and Order, contact Steve Sharkey, Rules Branch, Land Mobile and Microwave Division, Private Radio Bureau, (202) 634-2443.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Following is a list of parties filing comments and reply comments in response to the *Notice* in PR Docket 89-553:

Parties Filing Comments

Accent Radio Service, Inc.

Advanced Mobilecomm, Inc.

The Alarm Industry Communications Committee; Central Station Alarm Association

American Petroleum Institute

Dispatch Communications, Inc.

E.F. Johnson Company

Millicom Radio Telephone Company, Inc.

Motorola Inc.

National Association of Business and Educational Radio, Inc.

RAM Mobile Data, Inc.

SMR Network Association, Inc.

The Special Industrial Radio Service Association, Inc.

Telephone and Data Systems, Inc.

Utilities Telecommunications Council

Parties Filing Reply Comments

Ad Hoc Committee of Specialized Mobile Radio Operators

Advanced Mobilecomm, Inc.

The American Petroleum Institute

American SMR Network Association, Inc.

Fleet Call, Inc.

Millicom Radio Telephone Company

Motorola, Inc.

National Association of Business and Educational Radio, Inc.

National Telephone Cooperative Association

RAM Mobile Data, Inc.

The Special Industrial Radio Service Association

United Parcel Service

United Sates Telephone Associations

Utilities Telecommunications Council

Parties Filing Supplemental and Ex-Parte Comments

RAM Mobile Data, Inc.

Scott Byron and Co.

Southern California Edison

PowerSpectrum, Inc.

APPENDIX B

FURTHER INITIAL REGULATORY FLEXIBILITY ANALYSIS

1. **Reason for Action**: The changes, proposed herein, to Part 90 of the Commission's Rules will enhance use of the 200 channels allocated to the SMR service in the 900 MHz band. The new rules will allow licensees more flexibility, both geographically and operationally, to provide innovative, diverse services to land mobile users and will help create a 900 MHz SMR service distinct from the 800 MHz SMR service.

2. **Objectives:** The Commission seeks to promote development of a competitive and innovative SMR service in the 900 MHz band. Such a service will provide valuable new advanced communications options to the public.

3. **Legal Basis:** The legal basis for these rule changes is found in Sections 4(i), 303(g), 303(r), and 331(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(g), 303(r), and 332(a).

4. **Reporting, Recordkeeping, and Other Compliance Requirements:** Regional applicants must demonstrate that they have sufficient net assets to construct 40 percent of the proposed regional system and operate the system for two years. Nationwide applicants must demonstrate that they have sufficient net assets to construct 40 percent of the proposed system and operate the system for four years.

5. **Federal Rules Which Overlap, Duplicate or Conflict With These Rules:** None.

6. **Description, Potential Impact, and Number of Small Entities Involved:** Many small entities could be positively affected by this proposal because additional communications options would be made available to them. The number of small entities that will be affected is unknown. Additionally, expanded service opportunities will generate a demand for new communications equipment, a benefit for equipment manufacturers. An initial regulatory flexibility analysis was prepared for the *Notice of Proposed Rule Making* in this proceeding. That analysis anticipated that our actions in this proceeding will have a positive effect on a number of small and large businesses. We did not receive any comments that specifically addressed our Initial Regulatory Flexibility Analysis.

7. **Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives:** This Further Notice solicits comments on a variety of alternatives. Additionally, all significant alternatives presented in response to the *Notice* in this proceeding have been addressed in this *Further Notice of Proposed Rule Making*. This item is intended to minimize the regulatory burdens to our licensees, many of whom may be considered small business entities.

FINAL REGULATORY FLEXIBILITY ANALYSIS

1. **Need and purpose of this action:** These changes to Part 90 of the Commission's Rules will enhance use of channels allocated to the SMR service. The amended rules will allow licensees more operational flexibility and will ensure that the spectrum is being used.

2. **Summary of issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis:** The Initial Regulatory Flexibility Analysis stated that we anticipate that many small and large entities will be positively affected by this action because additional communications options would be made available to them. The number of small entities that will be affected is unknown. We did not receive any comments that specifically addressed our Initial Regulatory Flexibility Analysis.

3. **Significant alternatives considered and rejected:** All significant alternatives have been addressed in this *First Report and Order*. This item is intended to minimize the regulatory burdens to our licensees, many of whom may be considered small business entities.

APPENDIX C

Part 90 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 90 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303 and 332, unless otherwise noted.

2. Section 90.631 is amended by revising paragraph (f) to read as follows:

§ 90.631 Trunked system loading, construction and authorization requirements.

* * * * *

(f) If a station is not placed in permanent operation, in accordance with the technical parameters of the station authorization, within one year, except as provided in § 90.629, its license cancels automatically and must be returned to the Commission. For purposes of this section, a base station is not considered to be placed in operation unless at least two associated mobile stations, or one control station and one mobile station, are also placed in operation. An SMR licensee with facilities that have discontinued operations for a period in excess of sixty (60) consecutive days is presumed to have permanently discontinued operations, with the underlying license(s) subject to automatic cancellation unless the licensee provides the Commission with written justification of such a planned discontinuance of operations. Such justification must be received by the Commission 30 days before the expiration of the 60-day period and must include the reason for discontinuance and the anticipated duration of the discontinuance. The Commission may reject the licensee's justification and if so, the licensed facility must resume operations within 5 days of receipt of the Commission's rejection notification or by the sixtieth day from the date the station ceased operating, whichever is later. Failure to resume operations within this time will render the underlying license(s) subject to automatic cancellation.

* * * * *

3. Section 90.647 is amended by revising paragraph (b) and adding new paragraph (c) to read as follows:

§ 90.647 Station Identification.

* * * * *

(b) Trunked systems of communication, except as noted in paragraph (c) of this section, shall be identified through the use of an automatic device which transmits the call sign of the base station facility at 30 minute intervals. Such station identification shall be made on the lowest frequency in the base station trunk group assigned the licensee. Should this frequency be in use at the time station identification is required, such identification may be made at the termination of the communication in progress on this frequency. Identification may be made by voice or International Morse Code. When the call sign is transmitted in International Morse Code, it must be at a rate of between 15 to 20 words per minute and by means of tone modulation of the transmitter, the tone frequency being between 800 and 1000 hertz.

(c) Stations operating in either the 806-824/851-869 MHz or 896-901/935-940 MHz bands that are licensed on an exclusive basis, and normally employ digital signals for the transmission of data, text, control codes, or digitized voice may also be identified by digital transmission of the call sign. A licensee that identifies its station in this manner must provide the Commission, upon its request, information sufficient to decode the digital transmission and ascertain the call sign transmitted.

APPENDIX D

Part 90 of Chapter 1 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

1. The authority citation for Part 90 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303 and 332, unless otherwise noted.

2. Section 90.135 is amended by revising paragraph (a) introductory text and adding new paragraphs (g) and (h) to read as follows:

§ 90.135 Modification of license

(a) Except as provided in paragraphs (g) and (h) of this section, the following changes in authorized stations require an application for modification of license.

* * * * *

(g) Applications to add or modify SMR stations operating pursuant to a nationwide or regional authorization in the 896-901/935-940 MHz bands are not required prior to construction or modification of the station, except in instances where, due to the location of the station:

(1) The protection is required of certain locations in accordance with Section 90.177;

(2) A significant environmental effect may occur, as described in Section 1.1307 of this chapter;

(3) Notification is required to the Federal Aviation Administration as described in Section 17.7 of this chapter;

(4) Coordination is required in accordance with an international agreement;

(5) The station is located closer to the station of a co-channel licensee than is permitted under Section 90.621(b).

(h) Applications to license stations that are not required to be individually licensed in accordance with paragraph (g) of this section must be filed on the 4th, 6th, or 10th anniversary of the initial license grant for nationwide licenses and on the 2nd or 5th anniversary of the initial license grant for regional icenses. Applications must be filed at the appropriate anniversary date to cover any stations added or modified in a manner described in paragraph (a) of this section. After a nationwide or regional licensee's initial license term, applications for new or modified stations, other than those stations added or modified in accordance with paragraph (g) of this section, shall be filed at the time the license is renewed.

3. Section 90.149 is amended by revising paragraph (d) to read as follows:

§ 90.149 License term.

* * * * *

(d) Nationwide and regional authorizations under Subpart S of this part and nationwide authorizations under Subpart T of this part will be issued for a term not to exceed ten years from the date of the original issuance, modification or renewal.

4. Section 90.155 is amended by revising paragraph (a) to read as follows:

§ 90.155 Time in which station must be placed in operation.

(a) All stations authorized under this part, except as provided in paragraph (b) of this section and in §§ 90.629 and 90.631(f) and (g), must be placed in operation within eight (8) months from the date of grant or the authorization cancels automatically and must be returned to the Commission.

* * * * *

5. Section 90.607 is amended by revising paragraph (c) introductory text, by redesignating existing paragraphs (d) and (e) as new paragraphs (e) and (f), and adding new paragraph (d) to read as follows:

§ 90.607 Supplemental information to be furnished by applicants for facilities under this subpart.

* * * * *

(c) Applicants for non-nationwide and non-regional trunked systems must:

* * * * *

(d) Each application for nationwide or regional SMR category channels in the 896-901/935-940 MHz bands must include:

(1) For an application for a nationwide license, certification that, within ten years of receiving a license, the applicant will construct a minimum of one system in at least 70 different geographic areas; and that systems will be located in a minimum of 28 of the urban areas listed in § 90.741;

(2) For an application for a regional license, certification that, within five years of receiving a license, the applicant will construct a minimum of one system in at least 10 different geographic areas as defined in Section 90.631(k);

(3) For an application for either a nationwide or regional license, certification that all systems located in the ten urban areas listed in § 90.725(h) of this part shall have all assigned nationwide or regional channels constructed and placed in operation (regularly interacting with mobile and/or portable units); that all other systems considered for purposes of meeting the construction requirements of § 90.631(g) of this part will have a minimum of five of the assigned nationwide or regional channels constructed and placed in operation; and that for the purposes of meeting the requirements of this Section and of § 90.631(g), each *system* will consist of one or more base stations that will serve an area equivalent to a circular area with a diameter of 64 km (i.e., 3217 sq km);

(4) Certification that the applicant will meet the construction requirements set forth in § 90.631(g);

(5) A ten-year schedule for an application for a nationwide license or a five-year schedule for a regional license detailing plans for construction of the proposed system;

(6) An itemized estimate of the cost of constructing 40 percent of the proposed system and operating the system for the first four years of the license term for a nationwide license or two years of the license term for a regional license; and

(7) Proof that the applicant has sufficient financial resources to construct 40 percent of the proposed system and operate the proposed system for the first four years of the license term for a nationwide license or two years of the license term for a regional license; *i.e.*, that the applicant has net current assets sufficient to cover estimated costs or a firm financial commitment sufficient to cover estimated costs.

(i) Applicants for a nationwide or regional license relying on personal or internal resources for the showing required by this section must submit independently audited financial statements certified within one year of the date of the application showing net current assets sufficient to meet estimated construction and operating costs. Such applicants must also submit an unaudited balance sheet current within 60 days of the date of submission, that clearly shows the continued availability of sufficient net current assets to construct and operate the proposed system, and a certification by the applicant or an officer of the applicant organization attesting to the validity of the balance sheet.

(ii) Applicants submitting evidence of a firm financial commitment for the showing required by this section must obtain the commitment from a *bona fide* commercially acceptable source, *e.g.*, a state or federally chartered bank or savings and loan institution, other recognized financial institution, the financial arm of a capital equipment supplier, or a *bona fide* investment banking house. If the lender is not a state or federally chartered bank or savings and loan institution, other recognized financial institution, or the financial arm of a capital equipment supplier, or a *bona fide* investment banking house, the lender must also demonstrate that it has funds available to cover the total commitments it has made. The lender's commitment shall contain a statement that the lender:

(A) Has examined the financial condition of the applicant including an audited financial statement, and has determined that the applicant is creditworthy;

(B) Has examined the financial viability of the proposed system for which the applicant intends to use the commitment; and

(C) Is willing to provide a sum to the applicant sufficient to cover the realistic and prudent estimated costs of construction of the system and operation of the system for the first four years of the license term for nationwide applicants, or for the first two years of the license term for regional applicants.

* * * * *

6. Section 90.609 is amended by revising paragraph (c) and by adding paragraphs (e), (f) and (g) to read as follows:

§ 90.609 Special limitations on amendment of applications for assignment or transfer of authorizations for radio systems above 800 MHz.

* * * * *

(c) Licensees of constructed systems that are neither nationwide nor regional assignments, or are in any category other than the General Category, are permitted to make partial assignments of an authorized grant to an applicant proposing to create a new system or to an existing licensee that has loaded its system to 70 mobiles per channel and is expanding that system. An applicant authorized to expand an existing system or to create a new system with frequencies from any category other than the General Category obtained through partial assignment will receive the assignor's existing license expiration date and loading deadline for the frequencies that are assigned. A licensee that makes a partial assignment of a station's frequencies will not be authorized to obtain additional frequencies for that station for a period of one year from the date of partial assignment. The licensee of a nationwide or regional system in the 896-901/935-940 MHz band may not partially assign the authorization at any time.

* * * * *

(e) Except as indicated in paragraph (f) of this section, the Commission will not consent to the following:

(1) Any request to amend a nationwide or regional application so as to substitute a new entity as the applicant;

(2) Any application to assign or transfer a license for a nationwide or regional system before the licensee has constructed at least 40% of the proposed system pursuant to the provisions of § 90.631(g).

(f) The Commission will grant the applications described in paragraph (e) of this section if:

(1) The request to amend a nationwide or regional application or to transfer or assign a nationwide or regional license does not involve a substantial change in the ownership or control of the applicant; or

(2) The changes in the ownership or control of the nationwide or regional applicant are involuntary due to the original applicant's insolvency, bankruptcy, incapacity, or death.

(g) The assignee or transferee of a nationwide or regional system is subject to the construction benchmarks and reporting requirements of § 90.631(g). The assignee or transferee of a nationwide or regional system is not subject to the entry criteria described § 90.607(d).

7. Section 90.611 is amended by revising the first sentence of paragraph (d), by redesignating existing paragraphs (e) and (f) as new paragraphs (f) and (g), and by adding new paragraph (e), to read as follows:

§ 90.611 Processing of applications.

* * * * *

(d) Applications for channels in the SMRS category in the 806-821/851-866 MHz bands that cannot be granted due to a lack of available channels in a particular area will be placed on a waiting list for that area. * * *

(e) Applications for nationwide, regional, or local licenses in the 896-901/935-940 MHz bands will be processed on a first-come, first-served basis. Applicants may submit applications for no more than one of the nationwide licenses available in the 896-901/935-940 MHz band and no more than two regional licenses available in each region. When multiple applications are filed on the same day and there are insufficient frequencies available to grant all applications, the applications will be considered mutually exclusive and will be subject to random selection procedures pursuant to § 1.972 of this chapter. Applications filed on the same day will be treated equally.

* * * * *

8. Section 90.617 is amended by revising Table 4B of paragraph (d), redesignating existing Table 4C as new Table 4E, adding new Tables 4C and 4D to paragraph (d), and adding footnotes 4 and 5 following Table 4E, to read as follows:

§ 90.617 Frequencies in the 809.750-824/854.750-869 MHz, and 896-901/935-940 MHz bands available for trunked or conventional system use in non-border areas.

* * * * *

Table 4B- Nationwide SMR Category 896-901/935-940 MHz Band Channels 4/ (60 Channels):

Group No.	Channel Nos.
A	1-2-3-4-5-6-7-8-9-10-21-22-23-24-25-26-27-28-29-30
B	41-42-43-44-45-46-47-48-49-50-61-62-63-64-65-66-67-68-69-70
C	81-82-83-84-85-86-87-88-89-90-101-102-103-104-105-106-107-108-109-110

Table 4C - Regional SMR Category 896-901/935-940 MHz Band Channels 5/ (120 channels)

Group No.	Channel Nos.
D	121-122-123-124-125-126-127-128-129-130-141-142-143-144-145-146-147-148-149-150
E	161-162-163-164-165-166-167-168-169-170-181-182-183-184-185-186-187-188-189-190
F	201-202-203-204-205-206-207-208-209-210-221-222-223-224-225-226-227-228-229-230
G	241-242-243-244-245-246-247-248-249-250-261-262-263-264-265-266-267-268-269-270
H	281-282-283-284-285-286-286-288-289-290-301-302-303-304-305-306-307-308-309-310
I	321-322-323-324-325-326-326-328-329-330-341-342-343-344-345-346-347-348-349-350

Table 4D - Local SMR Category 896-901/935-940 MHz Band Channels (20 channels)

Group No.	Channel Nos.
J	361-362-363-364-365-366-367-368-369-370
K	381-382-383-384-385-386-387-388-389-390

* * * * *

4/ These channel groups are assigned on a nationwide basis; however, not all the channels will be available in border areas. Channels available in the border areas are listed in § 90.619.

5/ These channel groups are assigned on a regional basis; however, not all the channels will be available in border areas. Channels available in the border areas are listed in § 90.619.

* * * * *

9. Section 90.621 is amended by revising paragraphs (a) introductory text and (a)(1)(iv), by redesignating existing paragraphs (c), (d), (e), (f), (g), (h), (i), and (j) as new paragraphs (f), (g), (h), (i), (j), (k), (l), and (m), and by adding new paragraphs (a)(1)(v), (c), (d) and (e), to read as follows:

§ 90.621 Selection and assignment of frequencies.

(a) Applications for frequencies in the Public Safety, Industrial/Land Transportation, Business, and General categories must specify on the application the frequencies on which the proposed system will operate pursuant to a recommendation by the applicable frequency coordinator. Applicants for nationwide or regional SMRS frequencies in the 896-901/935-940 MHz bands must request a specific channel group from among those identified in Section 90.617 of this part. Applicants for non-nationwide and non-regional frequencies in the SMRS category may either request specific frequencies by including in their applications justification for the frequencies requested or may request the Commission to select frequencies for the system from the SMRS Category.

* * * * *

(iv) The maximum number of frequency pairs that will be assigned from the 806-821/851-866 MHz band to an SMR applicant at any one time is five. Except as indicated in paragraph (a)(v) of this section, the maximum number of frequency pairs that will be assigned from the 896-901/935-940 MHz band to an SMR applicant at any one time is ten.

(v) The maximum number of frequency pairs that will be assigned to a single licensee on a nationwide basis in the 896-901/935-940 MHz bands is 20; the maximum number of frequency pairs that will be assigned to a single licensee on a regional basis in the 896-901/935/940 MHz bands is 40 per region; the maximum number of frequency pairs in the 896-901/935-940 MHz bands that will be assigned on a regional basis to a licensee holding a nationwide authorization is 20 per region.

* * * * *

(c) Licensees operating pursuant to a nationwide or regional authorization on SMRS Category channels in the 896-901/935-940 MHz bands must provide co-channel protection, in accordance with paragraph (b) of this Section, to any previously authorized co-channel licensees.

(d) Individual regional licenses will encompass the geographic regions corresponding to each of the seven regions of the Regional Bell Operating Companies, including the areas within their operational boundaries that may be served by other carriers. Alaska, Hawaii, Puerto Rico and other possessions and territories will be considered to be located in the geographically closest market.

(e) The signal strength at the boundary of a regional licensee's area of operation may not exceed 30 dBu unless the written consent of the adjacent regional licensee is obtained.

* * * * *

10. Section 90.627 is amended by revising paragraph (a) and by adding new paragraphs (c), (d), and (e) to read as follows:

§ 90.627 Limitation on the number of frequency pairs that may be assignable for trunked systems and on the number of trunked systems.

(a) The maximum number of frequency pairs that may be assigned at any one time for the operation of a trunked radio system is twenty, except as specified in §§ 90.621(a)(1)(iv) and (a)(1)(v).

* * * * *

(c) No licensee of a nationwide authorization in the 896-901/935-940 MHz bands shall have an interest, either through ownership or through leasing or management agreement, in more than one 20-channel nationwide system in this band.

(d) No licensee of a regional authorization in the 896-901/935-940 MHz bands shall have an interest, either through ownership or through leasing or management agreement, in more than two 20-channel regional systems in each available region in this band.

(e) No licensee of a nationwide authorization in the 896-901/935-940 MHz bands shall have an interest, either through ownership or through leasing or management agreement, in more than one 20-channel regional system in each available region in this band.

11. Section 90.631 is amended by revising paragraphs (a), (b), (c), (d), (e) and (f), by redesignating existing paragraphs (g), (h) and (i) as new paragraphs (k), (l) and (m), and adding new paragraphs (g), (h), (i), and (j) to read as follows:

§ 90.631 Trunked system loading, construction and authorization requirements.

(a) Trunked systems, excluding nationwide and regional SMR systems in the 896-901/935-940 MHz band, will be authorized on the basis of a loading criterion of 100 mobile stations per channel. For purposes of determining compliance with trunked system loading requirements under this subpart, the term "mobile station" includes vehicular and portable mobile units and control stations.

(b) Each applicant for a trunked system, except for a nationwide or regional SMR system, shall certify that a minimum of 70 mobiles for each channel authorized will be placed in operation within five years of the initial license grant. Except as provided in paragraph (m) of this section, if at the end of five years a trunked system is not loaded to the prescribed levels and all channels in the licensee's category are assigned in the system's geographic area, authorization for trunked channels not loaded to 70 mobile stations cancels automatically at a rate that allows the licensee to retain one channel for every 100 mobiles loaded, plus one additional channel. If a trunked system has channels from more than one category, General Category channels are the first channels considered to cancel automatically. All licensees who are authorized initially before June 1, 1993, and are within their original license term or are within the term of a two-year authorization granted in accordance with paragraph (m) of this section are subject to this condition. A licensee that has had authorized channels cancelled due to failure to meet the above loading requirements will not be authorized to obtain additional channels to expand that same system for a period of six months from the date of cancellation.

(c) Except as provided in paragraph (d) of this section or in the case of a nationwide or regional licensee in the 896-901/935-940 MHz band, an applicant seeking to expand a trunked system by requesting additional channels from the Commission, or through intercategory sharing, or through an assignment must have a loading level of 70 mobiles per channel on the existing system that is the subject of the expansion request.

(d) In rural areas, a licensee of a trunked system, excluding nationwide and regional SMR systems in the 896-901/935-940 MHz bands, may request to increase its system capacity by five more channels than it has constructed without meeting the loading requirements specified in paragraphs (b) and (c) of this section. A rural area is defined for purposes of this section as being beyond a 100-mile radius of the designated centers of the following urbanized areas, as well as those areas that have a waiting list. The identified urbanized areas are: New York, NY; Los Angeles, CA; Chicago, IL; Philadelphia, PA; San Francisco, CA; Detroit, MI; Boston, MA; Houston, TX; Washington, DC; Dallas-Fort Worth, TX; Miami, FL; Cleveland, OH; St. Louis, MO; Atlanta, GA; Pittsburgh, PA; Baltimore, MD; Minneapolis-St. Paul, MN; Seattle WA; San Diego, CA; and Tampa-St. Petersburg, FL. The coordinates for the centers of these areas are those referenced in § 90.635, except that the coordinates for Tampa-St. Petersburg are latitude $28^0$0'00" N. longitude $82^0$27'00" W. Where waiting lists determine whether an area is rural, the designated centers of those areas will be identified on the actual waiting lists released by the Commission. If a waiting list is later established in a rural area, licensees who have acquired additional channels pursuant to this paragraph will be subject to the automatic cancellation provisions in paragraph (b) of this section at the end of one year from the date the area first appears on a Commission waiting list, or at the end of their license term, whichever is longer.

(e) Except as provided in paragraph (g) of this section and § 90.629, licensees of trunked facilities must complete construction within one year.

(f) If a station is not placed in permanent operation, according to the technical parameters of the authorization, within one year, except as provided in paragraph (g) of this section and § 90.629, its license cancels automatically and must be returned to the Commission. For purposes of this section, a base station is not considered to be placed in operation unless at least two associated mobile stations, or one control station and one mobile station, are also placed in operation. An SMR licensee with facilities that has not operated for sixty (60) consecutive days or more is presumed to have permanently discontinued operations, with the underlying license(s) subject to automatic cancellation unless the licensee provides the Commission with written notification of a planned discontinuance of over 60 days. Such justification must be received by the Commission 30 days before the expiration of the 60-day period and must include the reason for discontinuance and the anticipated duration of the discontinuance. The Commission may reject the licensee's justification and if so, the licensed facility must resume operations within 5 days of receipt of the Commission's rejection notification or by the sixtieth day from the date the station ceased operating, whichever is later. Failure to resume operations within this time will render the underlying license(s) subject to automatic cancellation.

(g) Licensees granted nationwide (or regional) authorizations will be required to construct and place systems in operation utilizing a minimum of five assigned nationwide (or regional) channels, except that in the ten urban areas listed in Section 90.725(h), systems must be constructed and placed in operation on all assigned nationwide or regional channels.

(1) Licensees granted nationwide authorizations must construct and place stations in operation:

(i) In at least 40% of the geographic areas designated in the application within four years of initial license grant, including base stations in at least 28 of the urban areas listed in § 90.741;

(ii) In at least 70 percent of the geographic areas designated in its application within six years of initial license grant, including base stations in at least 28 urban areas listed in § 90.741;

(iii) In all geographic areas designated in the application within ten years of initial license grant, including base stations in at least 28 of the urban areas listed in § 90.741.

(2) Licensees granted regional authorizations must construct and place stations in operation:

(i) In at least 40% of the geographic areas designated in the application within two years of initial license grant;

(ii) In all geographic areas designated in the application within five years of initial license grant.

(h) To count toward completion of the construction requirements of this Section a system consisting of one or more base stations must serve, at a minimum, an area equivalent to a circular area with a diameter of 64 km

(3217 sq. km). For purposes of calculating compliance with the construction requirements of this Section, any base stations separated by less than 64 km will be considered to be serving the same market.

(i) Nationwide licensees not meeting the four, six, or ten-year benchmarks shall lose their entire nationwide authorization including authorization to operate any stations already constructed. Regional licensees not meeting the two or five-year benchmarks shall lose their entire regional authorization including authorization to operate any stations already constructed.

(j) Each nationwide and regional licensee must file a system progress report on or before the anniversary date of the grant of its license after 4, 6, and 10 years (for nationwide licenses) or after 2 and 5 years (for regional licenses) demonstrating compliance with the relevant construction benchmark. This progress report must include:

(1) An overall status report of the system, that must include, but need not be limited to:

(i) A list of all sites at which base stations have been constructed, with antenna heights and effective radiated power specified for each site;

(ii) A list of all other known base station sites at which construction has not been completed; and

(iii) A construction and operational schedule for the next five-year period, including any known changes to the plan for construction and operation submitted with the licensee's original application for the system.

(2) An analysis of the system's compliance with the requirements of paragraph (g) of this section, with documentation to support representations of completed construction, including, but not limited to:

(i) Equipment purchase orders and contracts;

(ii) Lease or purchase contracts relating to antenna site arrangements;

(iii) Equipment and antenna identification (serial) numbers; and

(iv) Service agreements and visits.

* * * * *

12. Section 90.647 is amended by revising paragraph (c) to read as follows:

§ 90.647 Station Identification.

* * * * *

(c) Stations operating on frequencies in the 896-901/935-940 MHz bands licensed on a nationwide basis need not transmit a station identifier. Also, stations operating in either the 806-824/851-869 MHz or 896-901/935-940 MHz bands that are licensed on an exclusive basis, and normally employ digital signals for the transmission of data, text, control codes, or digitized voice may also be identified by digital transmission of the call sign. A licensee that identifies its station in this manner must provide the Commission, upon its request, information sufficient to decode the digital transmission and ascertain the call sign transmitted.

13. Section 90.651 is amended by revising paragraph (d) and by adding new paragraph (e) to read as follows:

§ 90.651 Supplemental reports required of licensees authorized under this subpart.

* * * * *

(d) Except for nationwide or regional licensees in the 896-901/935-940 MHz bands, licensees of trunked systems must report to the Commission's Private Radio Bureau, Licensing Division, Land Mobile Branch in Gettysburg, PA 17326, within thirteen months of the date of the grant, whether or not construction of the facility has been completed.

(e) Nationwide and regional licensees in the 896-901/935-940 MHz band shall submit a report at the time of filing an application for renewal of license containing details of their operation as specified in Section 90.631(j).

SEPARATE STATEMENT OF COMMISSIONER ANDREW C. BARRETT

In re: Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and 935-940 MHz Bands Allocated to the Specialized Mobile Radio Service [PR Docket 89-553].

I support this First Report and Order and Further Notice of Proposed Rulemaking to address proposed structures for licensing private land mobile nationwide, regional and local services in the 900 MHz band. Technology and service trends in the private land mobile industry indicate a stronger interest in wide-area communications capabilities. This Notice proposes various methods for achieving the necessary regulatory flexibility to offer a mix of wide-area and local services. As we continue to modify our approach to the licensing of future mobile radio service spectrum, I will be concerned that we approach these rulemakings in a balanced fashion. It is important that each proposal present a full set of options for various licensing schemes in order to develop a complete record for Commission decision. In this regard, I will closely monitor the record to determine the appropriate mix of channels for nationwide, regional and local licenses, and the number of channels that each licensee may obtain. Further, I will review the record to determine the extent to which new entrants are able to enter this service and compete for nationwide, regional or local licenses. In all mobile services dockets, the Commission should ensure that its licensing scheme is balanced, requires spectrum efficient use, and promotes competition among service providers in various market areas.

Before the
Federal Communications Commission
Washington, D.C. 20554

PP Docket No. 93-21

In the Matter of

Implementation of Section 26 of the
Cable Television Consumer Protection
and Competition Act of 1992

Inquiry into Sports Programming
Migration

NOTICE OF INQUIRY

Adopted: February 3, 1993; Released: February 9, 1993

Comment Date: March 29, 1993
Reply Comment Date: April 12, 1993

By the Commission: Commissioner Marshall not participating.

Table of Contents

	Paragraph
I.Introduction	1
II. Scope of the Inquiry	5
A. Sports Covered, Time Period Examined, and Geographical Considerations	5
B. Measuring Sports Programming Migration	8
C. Evaluating Changes in Video Distribution of Sports Programming	9
III. Video Distribution of Sports Programming	10
A. Professional Sports	11
B. College Sports	18
IV. Causes and Consequences of Sports Programming Migration	23
A. Causes	23
B. Consequences	28
V. Preclusive Contracts	31
VI. Conclusions and Administrative Matters	36
Appendix A: Letter from Antitrust Division, U.S. Department of Justice	

I. Introduction

1. By this *Notice of Inquiry* ("Notice"), the Commission seeks the data and information needed to conduct the sports programming study mandated by Congress in the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act of 1992" or "1992 Act").[1]

2. The study will examine, on a sport-by-sport basis, trends in the migration of sports programming from broadcast television to cable programming networks and pay-per-view services. For purposes of this inquiry, based on our review of the "legislative history, sports programming migration will be considered to be the movement of sports programming from broadcast television to a subscription medium (*i.e.*, one for which viewers pay a fee).[2]

3. The study will encompass local, regional, and national sports programming and will investigate "the economic causes and economic and social consequences" of migration trends. Moreover, the Commission is directed to "analyze the extent to which preclusive contracts between college athletic conferences and video programming vendors have artificially and unfairly restricted the supply of the sporting events of local colleges for broadcast on local television stations."[3] Finally, the legislative history of the Act suggests that we should, to the extent possible, "project future sports carriage trends".[4] Congress instructed the Commission to submit an interim sports migration report on or before July 1, 1993, and a final report on or before July 1, 1994. These reports are to include "such legislative or regulatory recommendations as the Commission considers appropriate."

4. Issues regarding the broadcasting of sports events, the "siphoning" or "migration" of sports telecasts from broadcast television to subscription or cable television,[5] the "blacking-outof local broadcasts,[6] exclusivity in the distribution of televised sports events,[7] and concerns relating to the

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[1] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). The Cable Act of 1992 was enacted on October 5, 1992, and the sports programming study instructions are in Sec. 26.

[2] An increase in the number of games exhibited via subscription media of an individual team or league would not, by itself, consititute sports programming migration. To identify migration, it would be necessary to examine the number and type of games (*e.g.*, regular season and playoffs) that were available via broadcast television.

[3] 1992 Cable Act, *supra* note 1, Sec. 26(a).

[4] *See* Committee on Energy and Commerce, U.S. House of Representatives, H.R. Rep. No. 102-628, 102d Cong., 2d Sess. ("House Report"), at 126.

[5] . *See e.g., Weaver v. Jordan*, 411 P. 2d 289 (1966)(State prohibitions on wire pay TV operations found to violate the First Amendment); *Fourth Report and Order in Docket 11279*, 15 FCC 2d 466 (1968) (FCC restrictions adopted on the broadcasting of sports events on over-the-air subscription television); *Home Box Office V. FCC*, 567 F2d 9 (D.C.Cir. 1977) (restrictions on distribution of sports and other programming on a subscription cable television basis violate the First Amendment).

[6] . *Report and Order in Docket 19417*, 54 FCC 2d 265 (1975)(FCC rules adopted requiring the certain sports events carried by cable systems on distant signals be blacked out in home market). *Third Annual Report of the Federal Communication Commission on the Effect of Public Law 93-107, The Sports Antiblackout Law, on the Broadcasting of Sold-Out Homes Games of Professional Football, Baseball, Baskdetball and Hockey*. U.S. Government Printing Office, June 1976 (FCC report on the effects of Public Law 93-107).

[7] . *See e.g., Major League Baseball*, 6 FCC Rcd 5573 (1991) (Application for special relief to accord additional exclusivity protection under the Commission rules to live broadcasts of sports events denied).

proper application of the antitrust laws and competition policies relating to sports leagues[8] have been matters of public policy concern for a number of years. This study will seek first to develop an updated factual record regarding the telecasting of sports events as mandated by the 1992 Cable Act. Second, it will seek to develop an analytical framework on which legislative recomendations regarding such telecasting may be based.

II. Scope of the Inquiry

A. Sports Covered, Time Period Examined, and Geographical Considerations

5. Neither the 1992 Act nor its legislative history provides a list of the sports that we should include in our analysis.[9] We thus have decided to focus our inquiry on sports that both have or have had significant broadcast exposure and significant non-broadcast exposure. Whether the measure is number of games/events or size of viewing audience, we tentatively conclude that the major relevant sports are Major League Baseball (MLB), the National Football League (NFL), the National Basketball Association (NBA), the National Hockey League (NHL), and college football and basketball. We urge commenters to address these sports. We also seek comment on video distribution of the Olympic Games. Commenters analyzing other sports should document carefully the magnitude of broadcast and subscription television coverage that they receive and have received.[10] Because Congress also instructed us to forecast future trends in the movement of sports programming,[11] we also solicit comments regarding sports that are now exhibited primarily on broadcast television but might move in the future.

6. We also wish to focus the inquiry in time. Because we have defined migration as movement from broadcast television to subscription media, we tentatively conclude that there is no need to review practices that predominated before the subscription media were widely available. Home Box Office became the first satellite-delivered cable service in 1975, and ESPN, the most popular national cable sports network, went on the air in 1979.[12] Superstations are another popular and widely available nationally-distributed source of sports programming.[13] The first superstation, WTBS, began satellite distribution in 1976, while WGN and WWOR became superstations in 1978 and 1979, respectively. In those early years, cable television was not widely available, and, of course, every cable subscriber did not have access to all of the sports-carrying services mentioned. By 1980, there were 19.2 million cable subscribers, representing 25.2 percent of the 76.3 million television households in the United States. ESPN had 3.7 million subscribers as of May 1980, representing 4.8 percent of television households. WTBS had 8.2 million subscribers and reached 10.7 percent of television households. Few regional cable networks were operating in 1980. For these reasons, we propose to begin our inquiry with the year 1980.[14] We seek comment on this time frame.

7. We also seek data on how the availability of ESPN, other national cable networks offering significant sports programming (*e.g.*, TNT and Black Entertainment Television), and the superstations have grown over time. We seek the same information with respect to regional sports networks (both broadcast and cable) and pay-per-view sports services. Because the statute directs us to consider local, regional, and national sports programming, we seek separate data on each geographic division.[15] We are particularly interested in comment as to the appropriate classification of superstations because, while they are local broadcast stations, some of them are available nationally.

B. Measuring Sports Programming Migration

8. We have defined migration as the movement of sports programming from broadcast television to a subscription

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[8] . *See e.g.*, The Sports Broadcasting Act of 1961, Publ. L. 87-331, 15 U.S.C. §§ 1291-5 (Granting owners of professional football, baseball, basketball and hockey teams a limited exemption from the sanctions of the antitrust laws, authorizing joint agreement to pool and sell package rights to telecasts of professional sporting events); *Chicago Professional Sports v. N.B.A.*, 754 F. Supp. 1336 (N.D. Ill. 1991)(Applicability of antitrust laws to National Basketball Association limits on the number of games that may be sold to broadcast "superstations"); *Association of Independent Television Stations v. College Football Association*, 637 F. Supp. 1289 (W.D. Okl. 1986)(Applicability of antitrust laws to agreement between College Football Association and ABC Sports and ESPN authorizing the televising of certain college football games).

[9] The only sport mentioned specifically is college football. See House Report, *supra* note 4, at 126.

[10] We note that sports such as tennis and golf are carried on both broadcast and subscription media.

[11] *See* note 4, *supra*.

[12] Data in this paragraph on Home Box Office, ESPN and superstations are from *Cablevision*, June 1, 1981, pp. 54-56. Data on total cable subscribers and television households are from Paul Kagan Associates, *Cable TV Investor*, Nov. 21, 1990, p. 9.

[13] The term "superstation" generally refers to an independent television broadcast station that is retransmitted by satellite. For copyright purposes, a superstation is defined as "a television station, other than a network station, licensed by the Federal Communications Commission that is secondarily transmitted by a satellite carrier." 17 U.S.C. §119(d)(9). The 1992 Cable Act incorporates this definition into the Communications Act's retransmission consent section and exempts superstations from the retransmission consent requirement, provided that they were distributed via satellite on May 1, 1991. 47 U.S.C. §325(b)(2). Cable systems retransmit superstations pursuant to a compulsory license (17 U.S.C. § 111). The satellite carrier compulsory license (17 U.S.C. §119) expires on December 31, 1994. With respect to their out-of-market retransmission to home satellite dishes and via cable systems, superstations are subscription services.

[14] We note that the House Report, *supra* note 2, at 126, asks whether there have been significant changes in the marketplace since the Commission's former sports siphoning rules were invalidated by the court in *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir. 1977). The foregoing discussion makes clear that the market today is vastly different from that of 1977. Our discussion is intended to provide a brief historical background on these changes. We note in particular that the former sports siphoning rules were struck down in 1977, prior to the start of ESPN, and that there was only one superstation (WTBS) in 1977. We seek more detailed comment for purposes of this inquiry.

[15] With regard to local and regional programming, we also seek information on any regional broadcast networks that might distribute sports programming. For example, St. Louis Cardinals baseball games are carried on a regional network with a "flagship" staion in St. Louis.

medium.[16] All of the major categories of sports that we are examining have both regular season games and post-season events. Despite the growth of subscription sports services, the character of major post-season events has, in our view, remained relatively constant from year to year. Hence, it is easy to measure migration of such events as the World Series, Stanley Cup, Super Bowl, NBA Championships, college football bowl games, or NCAA Final Four. With regard to regular season games, schedule changes from year to year and variations in the relative strengths of teams, in our view, make it more difficult to attempt to track the medium on which particular regular season games are exhibited. Hence, we propose to measure migration by comparing the total quantities of regular season games exhibited on broadcast and non-broadcast media from year to year and by making a separate post-season comparison. We seek comment on this approach and also on the appropriate units for measuring quantity. On first impression, we believe that the number of games in each category is the appropriate unit. However, we seek comment on whether it is useful and meaningful to measure migration by audience ratings or by some other method.

C. Evaluating Changes in Video Distribution of Sports Programming

9. In order to fulfill the mandate of the 1992 Act, we need an analytical framework to evaluate changes in the exhibition of sports programming. We tentatively adopt the following assumptions, but seek comment on each of them. First, we assume that the relevant sports leagues, teams, universities, and conferences desire to maximize their overall net revenues. These entities make the decisions about exhibition rights and they do so as part of overall revenue maximization plans. These plans include strategies for determining ticket prices, stadium concessions, and sales of licensed merchandise (jerseys, hats, etc.). Second, we assume that the relevant public policy goal is consumer welfare. In other words, the objective is to maximize the value to viewers of the menu of sports events telecast, subject to relevant constraints. It is difficult to quantify the value to viewers of sports programming, even on subscription media, for which they pay a direct fee. The absence of a direct charge for broadcast programming makes the task even more difficult in that case. We note, however, the statement in the House Report that "[A] significant reduction in the quality or quantity of sports programming available on free television, whether professional or collegiate, would be of great concern to this Committee."[17] Thus, we will focus on the availability of broadcast sports and the price and availability of subscription sports programming to the viewing audience.[18]

III. Video Distribution of Sports Programming

10. In order to document the degree of past sports programming migration and to make the best possible prediction of future trends, we would like to document any examples of migration that have already taken place. Along with general information on sports programming availability by medium, we seek descriptions of incidents of sports migration that carefully describe the availability of programming before and after the migration.[19] While we focus our attention on the six categories of professional and college sports enumerated in paragraph 5, commenters may also present data on other sports as appropriate.

A. Professional Sports

11. *General Considerations.* In this subsection, we request specific data on the four major professional sports identified above--the National Football League, Major League Baseball, the National Basketball Association, and the National Hockey League--beginning in 1980. As a preliminary matter, we request a description of the schedule of games for each sport: number of teams, number of regular season games, home and away, and structure of post-season play. In each case, we seek data on the number of games exhibited locally, regionally, and nationally on broadcast television, as well as on cable networks and pay-per-view services and on the number of games not exhibited at all.[20] In each category, commenters are requested to distinguish between home and away games. With respect to local television, commenters should list the station or stations[21] broadcasting the games and describe cable carriage, including noting if a superstation is involved. With regard to regional cable networks, we seek information on whether they are offered as basic cable services, pay cable services, or a combination of both.

12. Additionally, to the extent it is available, we request information on audience ratings, which may allow us to examine shifts over time in the demand for sports programming and to assess the impact of non-broadcast media on broadcast sports programming. We are particularly interested in data that allow comparison of program offerings and ratings before and after a change in the menu of

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[16] See para. 2 *supra*. We seek comment on whether the criteria in the Commission sports siphoning rules that were struck down in 1977 (see note 14 above), former 47 C.F.R. §76.225, should be incorporated in whole or in part into our definition. Pending receipt and analysis of data on exhibition of sports programming, we have not yet formed an opinion on the magnitude of sports programming migration.

[17] *See* House Report, *supra* note 4, at 125.

[18] In practice, it is likely that changes in availability of sports programming will be measured by tracking over time the number and composition of events in relevant categories available via various media, broadcast and subscription. However, we note that a simple comparison of number of games, without additional analysis, may not be sufficient to evaluate viewer satisfaction. Additionally, we note that the House Report, *supra* note 4, at 126, states that we should address "[w]hether further losses of sporting events from free over-the-air television negatively affect broadcast television stations' ability to compete with cable and other multichannel providers." We request comment on whether this reflects a Congressional concern with broadcast television stations' profitability independent of the issue of availability of sports programming to viewers.

[19] We also seek comment on examples of "reverse migration" and on how to evaluate them. For example, in recent years the early rounds of the NCAA basketball tournament have moved from ESPN to CBS.

[20] For games not exhibited at all, we request information on how many were available for exhibition (*i.e.*, the rights had been sold to a broadcaster, cablecaster, or other video distributor) and how many were not available for distribution.

[21] We understand that, in some cases, a "flagship" station acquires the rights to produce telecasts and distribute them over an ad hoc network of television stations in an area.

programming available (*e.g.*, before and after ESPN began carrying National Football League or Major League Baseball games).

13. We further request information on contract terms, including duration of contract, number of games for which rights have been sold (which may be more than actually exhibited), exclusivity provisions, and rights fees. In order to describe fully the exclusivity provisions, we request that commenters will delineate for each team the geographic "home territories" within which the team can sell broadcast and cable exhibition rights.

14. With regard to predicting future patterns of sports programming exhibition, we are interested in when the major current contracts expire, and whether, in the remaining years of current contracts, the number of games to be exhibited will change significantly. Comment also is sought on sports other than the four identified above that might be candidates for sports programming migration in the future. As noted above, we also specifically request documentation of any examples of sports programming migration that has already taken place.

15. *Specific Issues.* In this subsection, we raise some specific questions about the four major professional sports. This list is not, of course, meant to be exhaustive. With regard to the NFL, we are particularly interested in the transition to Sunday night cable exposure and its impact on total viewing of NFL games.[22] We understand that some of the weekend afternoon NFL telecasts are regionally differentiated and we seek comment on how regional games are distributed. In view of the fact that regional games are, in principle, available for "out-of-region" exposure, we ask for comment on any future expansion of NFL telecasts, including pay-per-view. Finally, we note that the NFL sells exclusive telecasting rights for all of its teams, unlike MLB, the NBA, or the NHL. We seek comment on whether the NFL's unique arrangement with its teams could accelerate or dampen migration of sports programming.

16. With respect to MLB, we seek comment on plans for national cable carriage in light of ESPN's recent decision not to exercise its option to extend its MLB contract beyond the coming year.[23] Additionally, we seek comment on two potential examples of sports programming migration--the decline over the last several years in the number of MLB games on national broadcast networks and the shift of games of individual teams (*e.g.*, the New York Yankees) from a local television station to a regional cable network.

17. The NBA and NHL, and the individual teams in both leagues, offer examples of potential sports programming migration. NBA and NHL teams appear to have pioneered different mixes of broadcast, cable, and pay-per-view exhibition in response to market conditions. We request comment on the transfer of individual NBA and NHL teams' games from local television to cable networks. In particular, we seek information on the pay-per-view packages sold by the Philadelphia 76'ers, Minnesota North Stars, Chicago Blackhawks, and Pittsburgh Penguins, and ask whether any of those arrangements constitute migration of sports programming. At the national level, we note that, with the exception of its All-Star game, there is no national broadcast network coverage of the NHL. What factors explain this absence? With respect to the NBA, we specifically request data on changes over time in the exhibition of playoff games.

B. College Sports

18. The Cable Act of 1992 requires an assessment of the trends of sports migration in collegiate sports programming. Collegiate sports programming has evolved into a highly competitive and increasingly complex environment at virtually all levels of carriage. In this subsection, we request specific data on college football and college basketball beginning in 1980.[24]

19. We seek data describing the schedule of games for the two sports. Such information should include, but not necessarily be limited to, the number of teams involved, the length of the regular season, the number of regular season games, the number of home games versus away games and the structure of postseason play. In each instance, we seek data on the number of games exhibited locally, regionally and nationally on broadcast television, as well as on cable networks and as pay-per-view events.[25] This information should clearly distinguish between home and away games. We also seek data on which games were exhibited live and which were shown on a tape delay basis. Information is also requested on the number of games available for exhibition (*i.e.*, for which rights had been sold) but not actually exhibited and on the number of games for which no video exhibition rights were sold.

20. In order to examine shifts over time in the demand for collegiate sports programming and to assess the impact of non-broadcast media on broadcast collegiate sports programming, we also request information concerning audience ratings. In particular, we are interested in data that will allow comparison of program offerings and ratings before and after a change in the menu of programming available (*e.g.*, before and after ESPN began carrying college football).

21. Additionally, we request information on contract terms, including but not necessarily limited to, duration of contract, the number of games for which rights have been sold (which could be more than actually exhibited), exclusivity provisions, and rights fees. In order to describe fully the contract provisions, we request that commenters will delineate forx each team the geographic "home territories" within which the college can sell broadcast and cable exhibition rights.

22. We also seek comment on the objectives of colleges, college athletic conferences, and other oraganizations of colleges that market exhibition rights to college sports. Our tentative assumption is that these organizations wish to maximize net revenues from athletics, subject to a variety of constraints related to their primary mission as educational institutions, and to enhance the general reputation of the institutions. While some degree of local television

[22] Monday Night Football began well before the 1980 starting point of our analysis.

[23] *See* Wayne Walley, "ESPN Says No to Baseball Extension," *Electronic Media*, Nov. 2, 1992, pp. 10, 44.

[24] We assume that college conferences and asociations, individual colleges, broadcast stations and networks, sports syndicators, and national and regional cable networks are the best sources of information on college sports telecasting.

[25] We seek comment on how to classify telecasts according to these three geographic categories and specifically on how to treat superstations.

exposure is beneficial in terms of generating fan interest, television coverage can in some instances reduce paid attendance. This could prompt colleges to limit broadcast coverage to away games. In order better to understand colleges' incentives, we seek comment on the percentage of athletic department revenue generated by sale of broadcast or other media distribution rights and by gate receipts for football and basketball respectively.

IV. Causes and Consequences of Sports Programming Migration

A. Causes

23. We seek comment on the economic causes of past and potential future sports programming migration. Has there been a change in demand for broadcast sports programming, particularly at the national level? The expansion in both broadcast and non-broadcast media outlets since 1980 has resulted in fragmentation of the viewing audience.[26] Has this, in turn, reduced the expected audience for sports programming and enhanced the relative profitability of other types of programming that may cost less to produce or acquire? Has there been a lag in the market's adjustment to any such new realities?

24. We also seek comment on the impact of new technologies on sports programming migration. Has the simple increase in availability of subscription media since 1980, plus the profit maximizing goals of sports rights holders, led to migration? Subscription media are able to charge subscribers more closely according to the intensity of their preferences than broadcast media can. Is it, then, more profitable to target a smaller audience that can be charged directly than a mass audience that yields only advertising revenues? We note that the 1992 Cable Act permits television broadcast stations, with certain exceptions, to "assert retransmission consent rights *vis-a-vis* multichannel video program distributors.[27] Thus, in the future, broadcasters may earn additional revenues in the form of retransmission consent fees. Commenters who address the importance of the "second revenue stream" available to cable and other subscription media should also assess the potential impact of retransmission consent on broadcasters' ability profitably to exhibit sports programming.

25. In this context, we also seek comment on league and team strategies in order to understand the factors that influence decisions regarding the sale of broadcast exhibition rights. For example, how important is broadcast media exposure in promoting interest in a team? Are gate receipts and attendance a function of the availability of local broadcasts of a team's games, or is the key factor whether the team is winning? What is the relationship between broadcast exposure and gate receipts and other sources of revenue? What are the shares of profits accounted for by gate receipts, television revenues, and other sources?

26. We also seek comment on the role of superstations and their impact on the availability of games both within and outside of their local markets. Superstations provide national distribution of a substantial number of Major League Baseball and National Basketball Association games. While superstations have been in existence since 1976, their availability to viewers has increased significantly since then, concomitantly with the increasing availability of cable television and other distribution media. We seek comment on what effect, if any, out-of-market games have on local broadcasts, on local or regional cable network telecasts, and on pay-per-view offerings. Additionally, we wish to examine the impact of superstation status on sports programming availability in the home markets of superstations. For example, does the out-of-market exposure and attendant increased advertising revenue in effect subsidize local broadcast of games on superstations? We also seek comment on the impact of superstation sports programming on national broadcast exhibition.

27. The House Report indicates that we should study "[t]he effect of the current professional sports antitrust exemption on the distribution of professional sports carriage rights."[28] We seek comment on how to analyze this issue. We approach it with some caution, because it is possible that distribution contracts would not be radically different even in the absence of the exemption. We seek comment on the extent to which this may be true. In addition, we suggest that, to the extent that a public policy problem exists that arises out of the antitrust exemption and that relates to exhibition of sports programming, it may be preferable to seek a remedy that directly addresses the rights holders, *i.e.*, the sports teams, leagues, etc. that actually sell the exhibition rights and are protected by the exemption. We seek comment on this suggestion too and on its implication--that any legislative or regulatory activity in this area be directed at the rights holders rather than the mass communications media to whom they sell.

B. Consequences

28. To assess the economic and social consequences of sports programming migration, we focus on two issues: availability of programming and price of programming. Today, roughly 95 percent of television households have access to cable television.[29] This figure is likely to increase gradually in the coming years. Hence, cable programming is almost universally available. Those households without cable access may have access to other delivery systems. For example, in many rural areas, home satellite dish systems provide access to programming where cable is not available. In some urban and suburban areas, technologies such as MMDS provide an alternative to cable. We seek com-

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[26] *See generally*, Florence Setzer and Jonathan Levy, *Broadcast Television in a Multichannel Marketplace*, Working Paper 26, Office of Plans and Policy, Federal Communications Commission (June 1991).

[27] *See* 1992 Cable Act, *supra* note 1, Sec. 6.

[28] House Report, *supra* note 4, at 126. The Sports Broadcasting Act of 1961, *supra* note 8, exempts from the antitrust laws joint agreements among professional sports teams in the NFL, NBA, NHL, and MLB to allow their respective leagues to sell "rights of such league's member clubs in the sponsored telecasting" of their games. The Sports Broadcasting Act also prohibits broadcast television blackouts except "within the home territory of a member club of the league on a day when such club is playing a game at home." MLB also benefits from a more general antitrust exemption. *See Federal Baseball Club v. National League*, 259 U.S. 200 (1922) (Professional baseball is not interstate commerce, so federal antitrust law does not apply.)

[29] *See* Paul Kagan Associates, *Marketing New Media*, June 15, 1992, p. 5. This source shows 95 percent of television households passed by cable in 1991 and projects 96 percent for 1992.

ment on the availability of cable and these other technologies, and on the prospects for sports programming delivery via DBS. We also seek comment on the availability of cable sports programming networks to rival delivery systems. Are there any "cable-exclusive" sports programming networks? Are such networks available via other media in uncabled areas? How will the new program access provisions of the 1992 Act affect the availability of sports programming? We also seek comment on the availability of pay-per-view capability on cable systems, particularly in areas that actually have pay-per-view sports programming. In sum, we wish to find out how migration has or might affect consumer access to sports programming.

29. Even if programming that has migrated to cable remains available to viewers, that availability comes at a price. Some viewers who did not previously subscribe to cable may find it necessary to do so to retain access to desired sports programming.[30] We seek comment on how to evaluate this phenomenon, including analysis of any social consequences of it.

30. From the viewpoint of consumer welfare, it is important to asssess whether the availability of subscription media for sports programming has increased or decreased total output, in addition to evaluating its effect on the output of broadcast sports programming. We seek comment on the extent to which subscription media have made available programming that otherwise would not have been transmitted via video at all.[31] In sum, is the public better served by the current mix of broadcast and subscription exhibition than it was before?

V. Preclusive Contracts

31. The 1992 Cable Act directs the Commission to determine whether "preclusive contracts between college athletic conferences and video programming vendors" artificially restrict the availability of local college sporting events for broadcast by local television stations. For the purposes of this inquiry, the 1992 Act defines as preclusive any contract that prohibits

> (A) the live broadcast by a local television station of a sporting event of a local college team that is not carried, on a live basis, by any cable system within the local community served by such local television station; or
>
> (B) the delayed broadcast by a local television station of a sporting event of a local college team that is not carried, on a live or delayed basis, by any cable system within the local community served by such local television station.[32] The reference to cable carriage in the definition suggests that the term "video programming vendors," which is not defined in this subsection, refers to cable networks, but we seek comment on this tentative assumption.[33]

32. In recent years, there has been an increase in contracts between collegiate athletic conferences and various cable sports channels. In some instances, these contracts may effectively preclude local television stations from obtaining rights to broadcast local college football or basketball games. Historically, cable sports channels have televised one game during the normally scheduled times for such games (*e.g.*, Saturday afternoon for college football), while their league contracts preclude local television stations from contracting directly with individual schools to broadcast any games, whether or not they are being telecast by the cable sports channel. Prior to such contracts, local television stations sometimes obtained the rights to broadcast local college games.

33. We seek information on which conferences have television contracts and with whom--regional cable networks, national cable networks, and, depending on the definition of "video programming vendors" considered appropriate, broadcast television stations or networks. How long have such contracts been in existence, which contracts have preclusive provisions, and what, if anything, is precluded under such provisions? In particular, if such contracts permit delayed broadcasts, what is the interval required between the live event and the delayed broadcast? From a business perspective, what is the relationship between the attractiveness (and hence the profitability) of a delayed broadcast and the interval between the live event and the broadcast? We also seek data concerning the number of collegiate football or basketball games that could have been available for broadcast and would have been broadcast by local television stations but for preclusive contracts between collegiate athletic conferences and cable sports channels (inclusive of pay-per-view).

34. In addition, we seek comment on whether college football and basketball games previously broadcast by local television stations but now carried on cable should be treated differently from games never previously broadcast but now carried on cable. In other words, we ask whether there is a significant connection between migration and preclusion. If these two types of games should be treated differently, how should they be treated? Additionally, we request comment on the economic and social consequences, if any, of preclusive contracts.

35. Pursuant to our statutory instructions, the Commission has consulted with the U.S. Department of Justice "to determine whether and to what extent such preclusive contracts are prohibited by existing statutes."[34] The Department's letter of opinion is attached as Appendix A. The letter indicates that the legality of preclusive contracts under the antitrust laws, in particular the Sherman Act, "would be judged under the rule of reason,' which requires a balancing of the potential anticompetitive effects of a practice against the potential competitive effects." In this case, the purpose of a rule of reason analysis would be to determine if the contracts limit or increase the quantity of sporting events telecast. The Department points out that

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[30] We note that NFL games carried on national cable networks are also made available via broadcast television in the home markets of the two teams playing.

[31] Our focus is on the four professional and two college sports discussed above, but commenters may address other sports as appropriate.

[32] 1992 Cable Act, Section 26(c)(2).

[33] We note that Section 12 of the 1992 Cable Act, which covers regulation of carriage agreements, defines "video programming vendor," for purposes of that section, as "a person engaged in the production, creation, or wholesale distribution of video programming for sale."

[34] 1992 Cable Act, Section 26(c)(1).

such an analysis requires attention to "definition of the relevant product and geographic markets; evaluation of the degree of market power possessed by the college leagues, on the one hand, and the programmers, on the other; and whether preclusive contracts permit the achievement of "efficiencies that could not readily be achieved in another manner."[35] Comments on the legality of preclusive contracts should address these factors.

VI. Conclusions and Administrative Matters

36. In responding to this Notice, we urge commenters to be as concise and precise as possible, to provide data that permit straightforward evaluation of the trends in sports programming exhibition, and to document carefully any examples of sports programming migration. We encourage comments from the sports leagues and teams, from players' organizations, from universities and college athletic conferences, from broadcast, cable, and other delivery media, from sports programmers, from relevant government agencies, and from other interested parties. We believe that much of the information that we seek in this inquiry is already in the public domain, and our purpose is not to compel private parties to reveal confidential business data. Should any party wish to submit confidential information, the Commission has procedures for protecting it.[36]

37. This Notice is issued pursuant to authority contained in the Cable Television Consumer Protection and Competition Act of 1992, Section 26, and Sections 4(i), and 403 of the Communications Act of 1934, as amended. 47 U.S.C. 154(i), and 403. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before March 29, 1993, and reply comments on or before April 12, 1993. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

38. For further information concerning this proceeding, contact Jonathan D. Levy, Office of Plans and Policy, (202) 653-5940.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[35] We note that the staff of the Federal Trade Commission's Bureau of Competition addressed some of these issues in a somewhat different context in a complaint against the College Football Association (a group of major colleges) and the ABC television network. See Complaint Counsel's Nonbinding Statement filed Oct. 26, 1990 in *In the Matter of College Football Association, an unicorporated association and Capital Cities/ABC, Inc., a corporation,* Federal Trade Commission Docket No. 9242. We further note that an Administrative Law Judge dismissed the case against the CFA on jurisdictional grounds.

[36] See 47 C.F.R. §§ 0.457(d), 459, and 461. *But cf.* 47 C.F.R. § 0.442.

APPENDIX A

U.S. Department of Justice

Antitrust Division

Judiciary Center Building
555 Fourth Street, N.W.
Washington, D.C. 20001

December 21, 1992

Renee Licht, Esq.
Acting General Counsel
Federal Communications Commision
1919 M Street, N.W.
Room 614
Washington, D.C. 20554

Re: Sports Programming Migration Study

Dear Ms. Licht:

In accordance with Section 26(c)(1) of the Cable Television Consumer Protection Act of 1992, staff of the Antitrust Division has discussed with staff of the FCC the application of the antitrust laws to "preclusive contracts," as that term is defined in Section 26(c)(2) of the Act. At the request of your staff, I am writing to set forth the issues that should be considered by the Commission in conducting the analysis required by Section 26(c)(1).

We understand that the contracts in question are generally between a college athletic conference or league and a video programming vendor. For agreed-upon consideration, the programmer is granted the exclusive right to televise all of the league's sporting events. Even if the programmer susequently decides not to televise a particular league event, it retains exclusive television rights to that event. This means that some league events may not be televised at all.

The legality of such "preclusive contracts" under the antitrust laws would be judged under the "rule of reason," which requires a balancing of the potential anticompetitive effects of a practice against the potential procompetitive effects, in order to assess whether such agreemments have the effect of limiting the televising of sporting events or whether they serve to increase the aggregate number of sporting events shown on television. Thus, the Commission's analysis should consider the definition of the relevant product and geographic markets; evaluation of the degree of market power possessed by the college leagues, on the one hand, and the programmers, on the

other; and whether preclusive contracts permit the achievement of efficiencies that could not readily be achieved in another manner.

These are the issues that should be addressed in any antitrust analysis of preclusive contracts. The Division has not to date conducted such an analysis, and any such analysis would necessarily depend on the specific facts presented. I cannot express any view at this time as to whether any such contracts do, in fact, violate the Sherman Act.

Sincerely,

Richard L. Rosen
Chief
Communications and Finance
Section

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 92-235

In the Matter of

Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them

ORDER EXTENDING COMMENT AND REPLY COMMENT PERIODS

Adopted: February 8, 1993; Released: February 9, 1993

Comment Date: May 28, 1993
Reply Comment Date: July 14, 1993

By the Chief, Private Radio Bureau:

1. On November 6, 1992, the Commission released a *Notice of Proposed Rule Making*, 7 FCC Rcd 8105 (1992), (*Notice*), in this proceeding. The specified deadlines for comments and reply comments were February 26, 1993 and April 14, 1993, respectively. On January 20, 1993, the Public Safety Communications Council (PSCC) filed a letter requesting that we extend the date for filing Comments and Reply Comments in this proceeding to August 25, 1993, and October 14, 1993, respectively. On February 3, 1993, the Land Mobile Communications Council (LMCC) filed a petition requesting that we extend the date for filing Comments to May 28, 1993. On February 4, 1993, Power-Spectrum, Inc. (PSI) filed a petition requesting that we extend the date for filing Comments and Reply Comments to May 26, 1993, and July 26, 1993, respectively.

2. PSCC based its request on the size of the *Notice* and on the need for additional time to conduct equipment tests and to review the U.S. Government planned migration to narrowband equipment. LMCC, an organization whose membership includes 20 trade associations, plans to develop an industry consensus position and to file it as comments by April 28, 1993. They would like the extension to give the public time to comment on this industry consensus. PSI requests the extra time to study the impact of the proposed channeling plans on the potential use of its frequency hopping multiple access technology (FHMA).

3. The proposals set forth in the *Notice* represent the most comprehensive review of the rules governing the private land mobile radio allocations below 512 MHz since their inception. The blueprint on how to increase channel capacity, to promote more efficient use of these channels, and to simplify the rules governing their use is complex and deserves the fullest cooperation between users of this spectrum and the government to assure that the rules ultimately adopted will constructively serve the public interest. To assist in this process we have scheduled a conference for March 1, 1993 to discuss publicly the issues raised in the *Notice*. In order to allow commenters the benefit of information gained in this meeting, and for the reasons set forth by the petitioners, we have concluded that additional time to prepare comments should be granted. We also believe, however, that the public interest requires us to reach a timely decision on the issues raised in the *Notice* and, thus, conclude that a long extension would disserve the land mobile radio community.

4. Accordingly, IT IS ORDERED, based on the authority granted in Section 0.331 of the Commission's Rules and Regulations, 47 C.F.R. § 0.331, that the petition of LMCC IS GRANTED, that the petitions of PSSC and PSI are granted to the extent indicated herein and otherwise denied, and, that the deadline for filing comments in the subject *Notice of Proposed Rule Making* is extended to May 28, 1993, and the deadline for filing reply comments is extended to July 14, 1993.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-141

In the Matter of

Expanded Interconnection with	Transport
Local Telephone Company Facilities	Phases I & II

ORDER

Adopted: February 12, 1993; Released: February 12, 1993

By the Chief, Policy and Program Planning Division, Common Carrier Bureau:

1. The National Association of Regulatory Utility Commissioners (NARUC) has requested an extension of the February 19, 1993 deadline for filing reply comments in Phase I of the above-captioned proceeding.[1] In support of its request, NARUC explains that its next meeting will be February 28 - March 4, 1993, which follows the February 19 reply date. Therefore, NARUC seeks an extension until at least March 10, 1993.[2]

2. We deny NARUC's request for an extension of time. It is the policy of the Commission not to grant extensions of time routinely.[3] NARUC has not demonstrated a need for a second extension in the filing of reply comments by interested parties in Phase I of this proceeding. In response to an earlier request by another party, we have already extended the deadlines for comments and replies in Phase I by two months and substantially increased the number of days between filing of comments and replies.[4] We believe that it would not be in the public interest to delay the generally applicable comment cycle in the Phase I proceeding any further. In the present situation, the particularized circumstances cited by NARUC are better considered in the context of a Motion for Acceptance of Late-Filed Comments and this action is without prejudice to NARUC's filing of such a motion.

3. Accordingly, IT IS ORDERED that the NARUC Request for Extension IS DENIED.[5]

FEDERAL COMMUNICATIONS COMMISSION

James D. Schlichting, Chief
Policy and Program Planning Division
Common Carrier Bureau

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[1] National Association of Regulatory Commissioners' Initial Comments and Request for Extension (filed January 14, 1993) (NARUC Request) submitted in response to *Expanded Interconnection with Local Telephone Company Facilities* and *Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, Second Notice of Proposed Rulemaking, (FCC 92-441), 7 FCC Rcd FCC 7740 (1992).

[2] NARUC Request at 6.

[3] 47 C.F.R. § 1.46(a).

[4] *Expanded Interconnection with Local Telephone Facilities* and *Transport Rate Structure and Pricing* and *Amendment of the Part 69 Allocation of General Support Facility Costs* and *Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, CC Docket Nos. 91-141, 91-213, 92-222, and 80-286, Order, DA 92-1606, 7 FCC Rcd 7936, 7937 (¶ 4) (1992).

[5] We take this action pursuant to our authority under Sections 4(j) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(j) and 155(c), and our delegated authority under Sections 0.91, 0.204(b), and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91, 0.204(b) and 0.291.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 93-6

In the Matter of:

Safeguards to Improve the Administration of the Interstate Access Tariff and Revenue Distribution Processes	RM 7736

NOTICE OF PROPOSED RULEMAKING

Adopted: January 14, 1993; Released: February 11, 1993

Comment Date: April 14, 1993
Reply Comment Date: May 14, 1993

By the Commission:

Table of Contents

	para.
I. INTRODUCTION	1
II. BACKGROUND	2
III. NECA'S BOARD	5
A. Inclusion of Outside Directors on NECA's Board	5
B. Eligibility Criteria for Outside Directors	12
C. Selection of Outside Directors	15
D. Term of Office	18
E. Voting Privileges on Committees	21
F. Prohibition of "Ad Hoc" Committees	23
IV. NECA RESPONSIBILITIES UNDER COMMISSION RULES	25
A. NECA's Overall Responsibilities	25
B. Resolving Controversial Issues	27
C. On-line Access to NECA Data Bases	31
V. STRENGTHENING NECA'S INTERNAL PROCEDURES	33
A. Overview	33
B. Monitoring Commission Developments	35
C. Incentive Compensation	38
D. Cost Study Review Process	42
E. Independent Audits for Non-pooling LECs	45
VI. CONCLUSION	47
VII. PROCEDURAL MATTERS	49
A. Ex Parte	49
B. Regulatory Flexibility	50
C. Comment Dates	51
VIII. ORDERING CLAUSES	52

I. INTRODUCTION

1. This Notice of Proposed Rulemaking proposes measures to improve the interstate access tariff and revenue distribution processes administered by the National Exchange Carrier Association, Inc. (NECA). To help assure that NECA considers independent views in administering those processes and that those processes comply with our rules, we propose to amend Section 69.602 of our rules[1] to include directors from outside the local exchange carrier (LEC) industry on NECA's Board of Directors. We also invite comment on additional steps that we believe would increase NECA and LEC accountability to this Commission, and strengthen NECA's internal operations.

II. BACKGROUND

2. This rulemaking arises from an audit that the Common Carrier Bureau (Bureau) conducted during 1989 and 1990. That audit disclosed that several NECA directors appeared to have participated in an attempt to improperly manage the earnings of NECA's common line (CL) pool for 1988. The audit also disclosed that these directors' actions may have induced certain large LECs to report data to NECA that were inconsistent with our accounting, separations, and access charge rules. We initiated enforcement actions to redress the LECs' apparent rule violations.[2] These actions have been terminated by Consent Decrees without any finding of wrongdoing or liability.[3]

3. We also expressed concern with the directors' apparent conduct. In a November 9, 1990 letter to NECA,[4] we indicated that several NECA directors may not have discharged their responsibilities under Commission rules and

[1] 47 C.F.R. §69.602.

[2] Southwestern Bell Telephone Company, Notice of Apparent Liability for Forfeiture and Order to Show Cause, 5 FCC Rcd 7179 (1990); Pacific Bell, Notice of Apparent Liability for Forfeiture and Order to Show Cause, 5 FCC Rcd 7176 (1990); New York Telephone Co., Notice of Apparent Liability for Forfeiture and Order to Show Cause, 5 FCC Rcd 7173 (1990); New England Telephone and Telegraph Co., Notice of Apparent Liability for Forfeiture and Order to Show Cause, 5 FCC Rcd 7170 (1990).

[3] Southwestern Bell Telephone Company, Consent Decree Order, 7 FCC Rcd 7692 (1992); New England Telephone and Telegraph Co. and New York Telephone Co., Consent Decree Order, 7 FCC Rcd 822 (1992); Pacific Bell, Consent Decree Order, 6 FCC Rcd 7467 (1991).

[4] Letter from Donna R. Searcy, Secretary, FCC, to Lawrence C. Ware, Chairman of the Board of Directors, NECA, 5 FCC Rcd 7183 (1990) (*November 9 Letter*).

that the NECA Board as a whole may not have displayed sufficient vigilance in regard to these directors' actions. We stated that we intended to consider expanding the NECA Board to include two or more members from outside the LEC industry.[5]

4. Our November 9 letter required NECA to retain an independent auditor to recommend safeguards to prevent manipulation of NECA's processes.[6] NECA filed the independent auditor's report on this audit on December 9, 1991.[7] The *Safeguards Report* observes NECA's strong commitment to its integrity and notes that NECA has improved its administrative processes considerably in response to our November 9 letter. The report concludes, however, that additional measures would help improve the interstate access tariff and revenue distribution processes. The independent auditor's recommendations for improving those processes focus on the composition and operation of NECA's Board, on the relationship between NECA and this Commission, and on methods for strengthening NECA's internal operations. We address those recommendations that we believe may warrant Commission action as part of our discussion of safeguards to improve NECA's processes.

III. NECA'S BOARD

A. Inclusion of Outside Directors on NECA's Board

1. Background

5. Prior to the completion of the *Safeguards Report*, NECA filed a petition for rulemaking to amend Section 69.602 of our rules to add two directors from outside the telephone industry to NECA's Board.[8] The rule provides that NECA's Board shall consist of fifteen directors, of whom three are to be selected by and represent the Bell Operating Companies (BOCs), three are to be selected by and represent other telephone companies having annual operating revenues in excess of $40 million, and nine are to be selected by and represent telephone companies having annual operating revenues of less than $40 million.[9] These directors are referred to as subset I, subset II, and subset III directors. They are elected for one-year terms that begin on the January 1 following their election.

6. At the time NECA filed its petition for rulemaking, it also filed a petition for waiver that proposed to include outside directors on its Board pending our action on the petition for rulemaking. The Bureau granted this petition for waiver in part and permitted NECA's members to elect two outside directors for the January 1 through December 31, 1992 term.[10] In granting that waiver, the Bureau stated that once we received the *Safeguards Report*, we would take whatever action we deemed appropriate to ensure that NECA settlements reflect actual financial results as calculated in accordance with our rules.[11] The Bureau subsequently permitted NECA's members to elect two outside directors for the January 1 through December 31, 1993 term.[12]

2. Arguments

7. In its petition for rulemaking, NECA requests that we amend Section 69.602 to permit two directors from outside the telephone industry to serve on NECA's Board. NECA argues that these directors will benefit its membership and increase public confidence in its processes and overall management.[13] In addition, NECA asserts that the outside directors' skills and experience would be a valuable asset that would complement NECA's commitment to the highest standards of conduct.[14]

8. The commenters generally support NECA's proposal to add two outside directors to its Board.[15] Iowa, NARUC, and NTCA agree that outside directors would promote public confidence in NECA's processes.[16] NARUC states that outside directors would add an independent view to and have a moderating effect on NECA's deliberations.[17] Iowa asserts that because NECA's decisions have a broad impact on telephone customers as well as telephone companies, non-telephone company representatives should be included on NECA's Board.[18] USTA emphasizes that it has consistently supported NECA-initiated Board changes since NECA's inception.[19]

3. Discussion

9. Our rules require NECA to administer several important programs, including the CL pool, the traffic sensitive (TS) pool, the universal service fund (USF), and the lifeline assistance program. We believe that continuing outside directors' participation on NECA's Board would help assure that NECA considers independent views in admin-

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[5] *Id.* at 7183.

[6] *Id.* Our letter also required NECA to retain an independent auditor to review adjustments that the Bell Operating Companies (BOCs) had reported to NECA during 1988 and 1989. *Id.* We will address the independent auditor's report on those adjustments in the near future.

[7] Ernst & Young, Review and Recommended Pool Safeguards, AAD 91-24 (filed Dec. 9, 1991)(*Safeguards Report*).

[8] On January 28, 1991, the National Association of Regulatory Utility Commissioners (NARUC) filed a petition for rulemaking urging that we initiate a rulemaking to determine how best to administer the national interstate pools. On November 18, 1992, however, NARUC adopted a resolution formally withdrawing that petition and urging that we grant NECA's petition for rulemaking. Resolution on NECA Administration and Expansion of Board of Directors, Bulletin No. 48-1992 (NARUC Nov. 30, 1992). In view of this resolution and our proposals in this Notice of Proposed Rulemaking, we dismiss NARUC's petition for rulemaking as moot.

[9] *Id.*

[10] Expansion of the NECA Board to Include Two Directors from Outside the Telephone Industry, 6 FCC Rcd 5403 (1991) (*1991 Waiver Order*).

[11] *Id.* at 5403.

[12] Expansion of NECA Board to Include Two Directors from Outside the Telephone Industry, 7 FCC Rcd 4401 (1992) (*1992 Waiver Order*).

[13] NECA Petition at 2, 6.

[14] *Id.* at 5.

[15] Beehive Telephone Company (Beehive), the Iowa Utilities Board (Iowa), NARUC, the National Telephone Cooperative Association (NTCA), and the United States Telephone Association (USTA) filed comments on NECA's petition. NECA and Southwestern Bell Telephone Company (Southwestern) filed replies to those comments.

[16] Iowa Comments at 1; NARUC Comments at 1, 5; NTCA Comments at 2.

[17] NARUC Comments at 5.

[18] Iowa Comments at 2.

[19] USTA Comments at 1.

istering those programs and that those programs comply with our rules. Therefore, we tentatively conclude that we should amend Section 69.602 of our rules to include at least two outside directors on that Board on a permanent basis. We invite comment on this tentative conclusion.

10. When we stated in our November 9 letter that we intended to consider adding outside directors to NECA's Board, we were addressing concerns about the ability of a Board composed exclusively of LEC representatives to assure that NECA discharged its obligations under Commission rules. We invite the commenters to address whether outside directors adequately address this concern.

11. We also invite comment on how many outside directors should be included on NECA's Board and on whether we should change the overall composition of that Board. That Board presently consists of seventeen directors, of whom two are outside directors serving pursuant to Bureau waiver. Of the other directors, three represent subset I companies, three represent subset II companies, and nine represent subset III companies. That configuration was intended to ensure the NECA Board's responsiveness to the concerns of each subset of NECA members after the CL pool became voluntary on April 1, 1989.[20] We believe that the Board's principal concern must be compliance with our rules and that the present configuration may not be optimal to address this concern. Therefore, we request the commenters to discuss whether alternative configurations, such as a Board composed of three outside directors, two subset I directors, two subset II directors, and six subset III directors, would improve NECA's administrative processes.

B. Eligibility Criteria for Outside Directors

1. Arguments

12. Our rules do not provide eligibility criteria for NECA directors. The directors elected pursuant to Section 69.602 have been employees of NECA member companies. In its petition, NECA proposes that current or former officers or employees of NECA or any of its members, and anyone related to such persons, be ineligible for outside directorships. NECA also proposes that outside directors not have business relationships or other interests that could interfere with their judgment.[21] These eligibility criteria would exclude current federal and state regulators as well as former officers and employees of NECA and its member LECs. According to NECA, the proposed criteria would ensure the outside directors' independence and objectivity.[22]

13. Although the parties generally support the eligibility criteria proposed by NECA, Iowa states that current federal and state regulators should be eligible for outside directorships.[23] NTCA maintains that former officers, employees, and the relatives of former officers and employees of NECA members should also be eligible. According to NTCA, making these persons ineligible would exclude a range of qualified persons who may have no existing ties to member companies, but possess valuable knowledge and skills and the ability to perform the fiduciary duties required of directors.[24] NTCA and Southwestern stress that we should not interpret NECA's request as an opportunity to placex NECA adversaries on the Board, because the addition of antagonistic directors would impair the NECA's operational efficiency and disserve consumers.[25] USTA believes that the proposed rule change would avoid the conflict of interest that could result if NECA's Board included members whose interests directly or indirectly conflicted with those that NECA exists to serve.[26] NTCA and USTA point out that in establishing NECA, the Commission initially determined that it would be unwise to include federal or state commission, interexchange carrier, or consumer representatives on NECA's Board.[27]

2. Discussion

14. The eligibility criteria NECA proposes would permit the selection of candidates for outside director from the business, professional, financial, and academic communities, including former governmental officials. We believe that these groups provide a sufficient pool of outside director candidates, even applying the eligibility criteria NECA proposes. In contrast, current federal and state regulators might find it impossible to act as directors without compromising confidential information obtained in course of their official employment or encountering substantial conflicts of interest. In addition, we believe that the public may perceive former LEC officers and employees of NECA and its members as too partial to LEC interests to function as independent outside directors. Therefore, we propose to adopt the criteria NECA proposes. We invite comment on this proposal.

C. Selection of Outside Directors

1. Arguments

15. NECA proposes that its Board's Election Committee screen outside director candidates after soliciting nominees from the business, professional, financial, and academic communities. Nominees deemed qualified by the Board would be listed on the ballot for NECA's annual election. NECA's members would select the outside directors from among the listed candidates.[28] NECA does not propose any requirement for a specific number of candidates to be listed for each outside director position.

16. NTCA supports the procedures NECA suggests for nominating and selecting outside directors because they comport with existing procedures for selecting NECA directors. NTCA believes that both the industry and the Board would benefit from treating the election of outside directors in the same mannerxas the election of other

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[20] MTS and WATS Market Structure, NECA Board of Directors, *Report and Order*, CC Docket No. 78-72, Phase I, 4 FCC Rcd 4449, 4449-50 (1989).

[21] Petition at 4; *see also* USTA Comments at 2.

[22] *Id.* at 6; NECA Reply at 4-5.

[23] Iowa Comments at 2.

[24] NTCA Comments at 5.

[25] NTCA Comments at 4; Southwestern Comments on NECA Petition at 3.

[26] USTA Comments at 3-4; NECA Reply at 5-6.

[27] NTCA Comments at 3; USTA Comments at 3; *see also* MTS and WATS Market Structure, Third Report and Order, 93 FCC 2d 241, 335 (1983).

[28] NECA Petition at 4-5.

NECA directors.[29] Beehive suggests that we require NECA to make public "[t]he companies voting and the number of ballots cast for proposed director per company" in order to obtain valuable insight into the attitudes of NECA members.[30]

2. Discussion

17. Although the procedures NECA proposes appear reasonable, we are concerned that NECA members have an opportunity to choose among a range of qualified candidates for outside directorships. Therefore, we invite comment on whether we should require that the Board nominate multiple candidates for each outside director position.[31] We decline to seek comment on Beehive's suggestion that NECA publicly disclose voting information regarding individual NECA members. That suggestion is similar to one Beehive made in a prior petition for rulemaking.[32] As the Commission stated in rejecting that prior suggestion, we see no useful purpose that would be served by the required disclosure of information regarding the votes of individual LECs.[33]

D. Term of Office

1. Arguments

18. Beehive complains that all NECA directors are "inbred from lack of turn-over" and that the Board "by and large, is the same today as it was when first constituted." Beehive suggests that the Commission mandate staggered terms for all directors with no one director serving more than two terms.[34] NECA states that in 1987 the Commission declined to require staggered terms despite a similar request from Beehive.[35] Also, NECA states that its Board has changed considerably since its inception in 1983. According to NECA, its Board members average three years of service, and only three members of the 1983 Board remained NECA directors as of July 1991.[36]

2. Discussion

19. We believe that two-year terms might increase the outside directors' effectiveness. Many NECA initiatives last more than one year. Two-year terms might enhance the ability of the outside directors to ensure that these initiatives are carried to completion in accordance with Commission rules. Therefore, we invite comment on whether we should set two-year terms for outside directors. In addition, since two-year terms also might increase the effectiveness of the NECA directors that represent individual subsets, we invite comment on whether we should adopt such terms for the entire NECA Board.

20. We also invite comment on whether we should adopt staggered terms for any director positions for which we set two-year terms. With staggered terms, at least one experienced director normally would be available to serve a second year. For instance, if we were to adopt a rule providing for two outside directors, we could specify that NECA's members elect one outside director to a one-year term and a second outside director to a two-year term in the first annual election following the rule's adoption. For every subsequent election, NECA's members would elect one outside director to a two-year term, while the incumbent director would continue in office for another year.

E. Voting Privileges on Committees

1. Background

21. Our rules restrict membership on NECA's CL and TS committees to directors from companies that participate in the CL and TS pools.[37] In the *Safeguards Report*, the independent auditor recommended that these committees be expanded to include outside directors as well as directors from non-pooling LECs.[38] In response to this recommendation, NECA filed a petition for waiver to permit such expansion. The Bureau granted this waiver request to the extent that outside directors were granted voting membership on all NECA Board committees, not just the CL and TS committees, during the 1992 term.[39] The Bureau deferred to this proceeding consideration of NECA's proposal to allow directors from non-pooling LECs to vote on the CL and TS committees.[40] The Bureau subsequently granted the outside directors voting membership on all NECA committees during the 1993 term.[41]

2. Discussion

22. As the independent auditor observes, much of the NECA Board's work is done in its committees.[42] We believe that having outside directors serve as voting members of these committees would increase the committees' accountability and help the Board as a whole monitor the committees' actions. We also believe that directors from non-pooling LECs would broaden the perspectives of NECA's voluntary pooling committees. Therefore, we propose to require that each NECA Board committee include as a voting member at least one outside director and that both the CL and TS committees include as voting members at least one director from non-pooling LECs. We invite comment on these proposals.

F. Prohibition of "Ad Hoc" Committees

1. Background

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[29] NTCA Comments at 5-6.
[30] Beehive Comments at 1.
[31] *See 1991 Waiver Order*, 6 FCC Rcd at 5403 (waiver conditioned upon the nomination of five or more candidates for two outside directors positions).
[32] Rules Pertaining to the National Exchange Carrier Association, 2 FCC Rcd 1 (1987) (*Beehive Order*).
[33] *Id.* at 2.
[34] Beehive Comments at 1.
[35] NECA Reply at 3, n.4, *citing Beehive Order*, 2 FCC Rcd at 2.
[36] NECA Reply at 3.
[37] *See* 47 C.F.R. §69.602(e).
[38] *See Safeguards Report, supra* at 28-29.
[39] *See* Expansion of Voting Membership on Voluntary Access Tariff Committees, 7 FCC Rcd 2050 (1991) (*Voting Membership Order*).
[40] *Id.* at 2050-51.
[41] *See 1992 Waiver Order*, 7 FCC Rcd at 4402.
[42] *See Safeguards Report, supra* at 28-29.

23. The independent auditor recommends that NECA change its bylaws to prohibit Board committees other than "standing committees." Unlike standing committees, "ad hoc" committees do not keep formal minutes, so there is no official record of the committees' deliberations and decisions. In response, NECA has amended its bylaws to require that all Board committees be appointed by Board resolution. The amended bylaws also require Board committees to keep formal minutes and report all their actions to the full Board.[43]

2. Discussion

24. While these amendments should help assure that NECA administers the interstate access tariff and revenue distribution processes in accordance with our rules, NECA's bylaws permit NECA committees to establish subcommittees, without making clear whether the subcommittees must be appointed by committee resolution, keep formal minutes, and report all their actions to the full committee. We tentatively conclude that we should require NECA to amend its bylaws to specify these procedures. We invite comment on this tentative conclusion.

IV. NECA RESPONSIBILITIES UNDER COMMISSION RULES

A. NECA's Overall Responsibilities

25. NECA was created to prepare and file access charge tariffs and to collect and distribute access charge revenue in accordance with Commission rules.[44] Because it is an association of LECs, NECA faces potentially conflicting forces in the performance of these functions. On the one hand, NECA must make reasonable efforts to ensure that all LECs that participate in its access tariff and revenue distribution processes comply with the Commission rules that affect those processes. On the other hand, many of NECA's members expect NECA to maximize their interstate earnings, a goal that may not advance strict compliance with our rules.

26. In this Part, we address ways to improve NECA's efforts to achieve the goal of rule compliance. Before turning to specific measures, we wish to make clear that we expect NECA to make reasonable efforts to interpret our rules correctly and to implement those interpretations. In the course of its operations, NECA receives much data that LECs must assemble in accordance with our accounting, separations, and access charge rules. We recognize that NECA cannot review each LEC submission in minute detail and that NECA has adopted review standards, methods, and procedures designed to detect LEC noncompliance. If, as a result of its review, NECA concludes that LEC data do not comply with our rules, we expect NECA to correct the data in its revenue requirement and revenue distribution computations. We invite comment on how these procedures should evolve.

B. Resolving Controversial Issues

1. Background

27. Many of the issues requiring NECA interpretations arise in the application of general rules to specific facts and circumstances. The independent auditor recommends several steps to reduce the need for such interpretations and to ensure their accuracy. First, the independent auditor suggests that NECA establish an "early warning" procedure to alert the Commission to emerging and potentially controversial issues so that the Commission would be familiar with them if and when NECA makes a filing. Second, the independent auditor suggests that a process be established for timely Commission action on LEC petitions for waivers or requests for clarification of Commission rules. Third, the independent auditor recommends that NECA petition us to set minimum standards for the timing and content of the studies LECs use to perform jurisdictional separations and to allocate the interstate portion of their costs among access elements. Finally, the independent auditor suggests that NECA should develop a long-term plan for simplifying the pooling process.[45]

2. Discussion

28. We recognize that NECA sometimes is uncertain about what our rules require in specific circumstances. However, as stated above, we require only that NECA make reasonable efforts to interpret our rules correctly and to implement its interpretations.[46] We believe that the cost issues manual that NECA has maintained since 1990 is an effective tool for these purposes. We believe that the procedure NECA uses to update this manual can be improved. According to the independent auditor, NECA includes interpretations in this manual only after circulating them throughout NECA's cost study membership.[47] Although we have no objection to consultations between NECA and its members, NECA's efforts to understand a rule's meaning should not focus on developing either an industry consensus regarding that meaning or an interpretation that accommodates divergent LEC viewpoints. Such efforts are unlikely to lead to a correct interpretation. Instead, NECA must exercise its own independent interpretive judgment and then implement its interpretation.

29. Our staff is, of course, available to assist NECA's interpretative efforts through informal discussions. NECA may also file a petition for declaratory ruling to obtain an interpretation of our rules.[48] We will act on any such petitions as early as practicable. We emphasize that the pendency of such petitions neither eliminates NECA's obligation to implement our rules nor excuses rule violations by LECs.

30. We also believe the independent auditor raises important questions regarding our standards for cost study revisions and the prospect of simplifying the pooling process. We intend to examine these questions as part of our continuing efforts to reform our regulatory requirements. For instance, in our proceeding regarding tariffing pro-

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[43] By-laws of National Exchange Carrier Association, Inc., §§5.3, 5.5 (amended Sept. 10, 1992) (*NECA Bylaws*).

[44] *See* 47 C.F.R. §§69.601, 69.603; MTS and WATS Market Structure, 93 FCC 2d at 335-36.

[45] *Safeguards Report* at 31-32, 35.

[46] *See* Part IV(A), *supra*.

[47] *Safeguards Report* at 23.

[48] *See, e.g.*, 47 C.F.R. §32.17 (accounting questions involving matters of significance that our rules do clearly provide for are to be submitted to the Bureau for explanation, interpretation, or resolution).

cesses for rate of return LECs, we invited the commenters to address how in the future we might remove obstacles to the introduction of incentives for increased efficiency into the NECA pools.[49] In these circumstances, we decline to consider the independent auditor's question regarding the pooling process in this proceeding.

C. On-line Access to NECA Data Bases

31. NECA maintains computer-based files of the data that LECs provide it pursuant to our rules. These files include cost and demand data that individual LECs submit to NECA to enable it to prepare interstate access tariffs and to distribute revenues from those tariffs. NECA's files constitute a relatively complete source of company-specific data on NECA pool participants. The files also contain extensive information that pool non-participants submit to NECA to enable it to administer the USF, lifeline assistance, and long term support programs.

32. We believe that on-line, dial-up access to these computer-based files would enhance our ability to assure that NECA administers the interstate access tariff and revenue distribution processes in accordance with our rules. Therefore, we propose to require NECA to provide us with such access once safeguards are established to guarantee data base integrity and prevent unauthorized access. We invite comment on this proposal and on what safeguards we should adopt.

V. STRENGTHENING NECA'S INTERNAL PROCEDURES

A. Overview

33. We believe NECA's successful administration of the interstate access tariff and revenue distribution processes must be based on three premises. First, NECA must understand our rules sufficiently to instruct LECs how to implement them. Second, NECA must have sufficient tools at its disposal to determine whether LEC submissions comply with those rules. Third, NECA must use those tools to secure compliance.

34. In the *Safeguards Report*, the independent auditor discusses a number of broad-based changes that NECA has made in its internal procedures since the conclusion of the Bureau's audit. They affect how NECA trains and compensates its officers and employees, how NECA reviews LEC data, and how NECA determines whether its review is sufficient. While the independent auditor concludes that these changes generally improve NECA's internal operations, it recommends additional changes. We agree with this overall assessment, and the remainder of this Part discusses measures to strengthen NECA's internal operations. We invite comment on each of these measures.

B. Monitoring Commission Developments

1. Background

35. In the *Safeguards Report*, the independent auditor observes that since the Bureau audit, NECA has expanded and improved its programs for educating its staff and member companies regarding Commission requirements.[50] The independent auditor recommends, however, that NECA develop a more formal program for monitoring our decisions as well as the status of LEC filings with this Commission. In the independent auditor's view, such a program would help inform NECA's members of changes in our requirements in sufficient time to reflect them in data filed with NECA. The independent auditor also suggests that improved monitoring would help NECA prevent LECs from prematurely implementing relief sought in waiver petitions.[51] NECA states that it will continue to improve its programs for gathering, analyzing, and disseminating information on our rules and that it will develop additional procedures to ensure that its staff and member companies use this information.[52]

2. Discussion

36. It appears that NECA has improved its programs for making its staff aware of our requirements. However, these programs may give NECA's employees inadequate guidance when they instruct LECs how to comply with our rules and review LEC submissions for compliance. For instance, the independent auditor finds that in the cost issues manual that NECA maintains to instruct its employees,[53] NECA "strives to attain consistency across [our rules] by identifying one or more acceptable interpretations of particular [rules]" and "is reluctant to take a firm position on ambiguous issues."[54] We believe that these multiple interpretations are inconsistent with NECA's responsibility to implement its own, independent interpretations of our rules.[55]

37. Absent a stay or waiver, it is unacceptable for any carrier to fail to comply with our rules, even when the rules are subject to pending petitions for reconsideration, stay, or waiver. We believe that it would help NECA detect instances of noncompliance, if responsible LEC officers or employees were to certify whether data submitted to NECA comply with our rules. We invite comment on whether we should require such a certification and, if so, how we might implement it in regard to data submitted to NECA only in computer format.

C. Incentive Compensation

1. Background

38. During 1987, NECA initiated an incentive pay plan that rewards certain NECA officers and employees with annual bonuses above regular base salaries for achieving performance objectives. The objectives include NECA's CL and TS pools' achievement of the authorized rate of return. Although NECA revised this plan in 1991, an average of seven percent of NECA's executive compensation continues to depend on the CL and TS pools' rates of return. The independent auditor recommends that NECA reduce this

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[49] Regulatory Reform for Local Exchange Carriers Subject to Rate of Return Regulation, *Notice of Proposed Rulemaking*, CC Docket No. 92-135, 7 FCC Rcd 5023, 5030 (1992).

[50] *See, e.g., Safeguards Report* at 11, 23-24.

[51] *Id.* at 33.

[52] *Id.*, Attachment II at 14.

[53] *See* Part IV(B), *supra*, 7

[54] *Id.* at 23-24.

[55] *See* Part IA(A), *supra*.

incentive compensation, so as to avoid potential conflicts of interest or at least the appearance of such conflicts. The independent auditor also recommends that NECA create performance incentives for ensuring rule compliance throughout NECA.[56]

2. Discussion

39. To an extent, the rates of return the CL and TS pools realize are dependent on the quality of the data that NECA uses in preparing its access tariff filings. If those data accurately forecast both the costs of and the demand for the services the pool participants will provide under the tariffs, the pools should earn the authorized rate of return. We support NECA's efforts to improve the accuracy of the forecasts that it uses in its tariff filings.

40. However, NECA's incentive compensation plan may reward noncompliance with our rules. This could occur, for example, if a plan motivated officers or employees to insure conformance of reported data with forecast data, regardless of the forecast's accuracy. Incentive compensation plans that have this effect are unacceptable. As the independent auditor suggests, such plans create at least a potential conflict of interest.

41. Neither the *Safeguards Report* nor NECA's response to it makes clear the precise details of NECA's current incentive compensation plan. Because improper incentives could undermine NECA's administration of the CL and TS pools, we propose to require NECA to submit that plan for our review. We also propose, pending that review, to preclude NECA from paying any officer or employee based on the rate of return earned by the CL and TS pools. We invite comment on these proposals. We also invite the commenters to recommend methods by which NECA might assess its effectiveness in securing LEC compliance with our rules.

D. Cost Study Review Process

1. Background

42. In 1990, NECA implemented a new process for reviewing the studies that NECA pool participants use to determine their CL and TS costs. This process has several steps. Initially, the NECA staff checks each study for input and methodological errors, and runs the study through NECA's jurisdictional cost allocation program to see if NECA's and the LEC's results agree. Thereafter, NECA attempts to identify the "riskiest" cost studies for further review. This review is generally "streamlined," but NECA conducts a limited number (seven in 1991) of on-site, cost study reviews each year.[57]

43. In the *Safeguards Report,* the independent auditor suggests that NECA should redesign this process to provide greater assurance of LEC compliance with Commission rules. Although the independent auditor agrees that NECA need not review each cost study in detail every year, the independent auditor states that NECA needs to do more selective and effective field reviews. According to the independent auditor, these on-site reviews need not cover all possible cost study items, but rather, should focus on compliance in areas where the LEC has demonstrated problems before or where the nature of the LEC's operations suggests risk factors.[58]

2. Discussion

44. Informal discussions with NECA's staff indicate that NECA has refined and focused its cost study review efforts since the completion of the *Safeguards Report.* We invite NECA to describe those efforts in detail in its comments so they can be made part of the record in this proceeding. Upon review of that information, we may make additional proposals. Among the actions we may require is to have NECA provide us with an annual report on the results of its cost study review process. We invite comment on whether such a report would be an effective tool for ensuring that NECA's members implement our rules.

E. Independent Audits for Non-pooling LECs

1. Background

45. Our rules permit CL and TS pool participants to leave those pools and file their own tariffs.[59] In the *Safeguards Report,* the independent auditor recommends that all LECs be subjected to the same cost study review standards, methods, and procedures, regardless of pool participation. The independent auditor states that if the review standards are different, LECs may consider the differences in choosing whether or not to participate in the pools. The independent auditor recommends that the Commission, NECA, and the industry agree on cost study review standards, methods, and procedures for all LECs. The independent auditor also suggests that, if the Commission's cost study review resources are limited, it could "outsource" to NECA the responsibility for reviewing cost studies for small LECs that file their own tariffs with the Commission.

2. Discussion

46. We believe that we cannot properly "outsource" to NECA the responsibility for reviewing LEC cost studies that do not affect NECA's revenue requirement or revenue distribution computations. Therefore, we will not implement the independent auditor's recommendation in this regard. We are concerned, however, that LECs may leave NECA's pools to avoid NECA's review processes. One response may be for this Commission to require a sample of rate of return LECs that file their own tariffs to retain independent auditors to report annually on the sufficiency of the LECs' cost studies. We invite comment on whether the benefits of this approach would exceed its costs. We also invite the commenters to suggest alternative measures that might achieve comparable benefits at lower costs.

VI. CONCLUSION

47. In this Notice, we initiate a rulemaking to strengthen NECA's administration of the interstate access tariff and revenue distribution processes. We propose to amend Section 69.602 of our rules to add outside directors to NECA's Board on a permanent basis. We also invite comment on a

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56 *E.g., id.* at 10-11, 32.
57 *Id.* at 12-22.
58 *Id.* at 33.
59 *See, e.g.,* 47 C.F.R. §69.3.

series of proposals to strengthen that Board, help NECA fulfill its responsibilities under our rules, and improve NECA's internal operations.

48. In initiating this rulemaking, we wish to emphasize our belief that NECA has improved itself significantly since our November 9 letter. We are heartened by that constructive response. We believe that the measures we propose would enable NECA to add to its record of achievement in administering the interstate access tariff and revenue distribution processes.

VII. PROCEDURAL MATTERS

A. Ex Parte

49. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's rules.[60]

B. Regulatory Flexibility

50. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because if the proposals in this proceeding are adopted, there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act.[61] Those proposals address the administration of the interstate access tariff and revenue distribution processes by NECA, which is an association of LECs. Because of the nature of local exchange and access service, the Commission has concluded that LECs, including small LECs, are dominant in their fields of operation and therefore are not "small entities" as defined by that act.[62] The Secretary shall send a copy of this Notice of Proposed Rulemaking, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of that act.[63]

C. Comment Dates

51. We invite comment on the proposals and tentative conclusions set forth above. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules,[64] interested parties may file comments on or before **April 14, 1993,** and reply comments on or before **May 14, 1993.** To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. A courtesy copy should also be sent to William A. Kehoe III, Accounting and Audits Division, 2000 L Street, N.W., Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 239, 1919 M Street, N.W., Washington, D.C. 20554.

VIII. ORDERING CLAUSES

52. Accordingly, IT IS ORDERED that, pursuant to Sections 1, 4(i), 201-205, 218-220, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§151, 154(i), 201-05, 218-20, and 403, NOTICE IS HEREBY GIVEN of proposals described in this Notice of Proposed Rulemaking.

53. IT IS FURTHER ORDERED that the petition for rulemaking filed January 28, 1991 by the National Association of Regulatory Utility Commissioners IS HEREBY DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[60] *See generally* 47 C.F.R. §§1.1202, 1.1203, 1.1206(a).
[61] 5 U.S.C. §601(3).
[62] *See* MTS and WATS Market Structure, 93 FCC 2d 241, 338-39 (1983).
[63] 5 U.S.C. §603(a).
[64] 47 C.F.R. §§1.415, 1.419.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 12, 1993

***Ex Parte* Presentations Relating to 2 GHz Personal Communications Services' Pioneer's Preference Requests, GEN Docket No. 90-314**

Several parties filing comments or letters regarding the Commission's *Tentative Decision* on various pioneer's preference requests related to 2 GHz personal communications services, GEN Docket No. 90-314, failed to serve their filings on other parties to the particular pioneer's preference request addressed, as required by the Commission's *ex parte* rules. *See Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services, Report and Order*, 6 FCC Rcd 3488, 3493 (para. 42) & 3500 (note 9) (1991); *Public Notice, Ex Parte Presentations Relating to Requests for Pioneer's Preferences*, 7 FCC Rcd 4046 (Chief Engineer 1992). Indeed, the *Tentative Decision* specifically stated that the pioneer's preference requests in this proceeding (all of which have been formally opposed) are restricted adjudications. *See Amendment of the Commission's Rules to Establish New Personal Communications Services, Tentative Decision and Memorandum Opinion and Order*, 7 FCC Rcd 7794, 7813 (para. 50) (1992).

Several parties nevertheless seem to have been confused about the relevant *ex parte* requirements. In light of the apparent confusion, we will not follow our usual practice with respect to the failure of parties properly to serve their filings on other parties to the specific pioneer's preference requests involved. *See* 47 C.F.R. § 1.1212(d). Instead, interested parties are hereby advised that all such filings will be considered in the proceeding and are available for public inspection during regular business hours in the FCC Reference Center (Room 239), 1919 M St., NW, Washington, DC 20554. *See* 47 C.F.R. §§ 1.1212(d), (f).

LParties to pioneer's preference requests in this and other dockets are again reminded that once a pioneer's preference request is formally opposed, that request becomes a restricted adjudication and *ex parte* presentations are prohibited. Filings must be served on all other parties to the specific pioneer's preference request(s) addressed. Failure to comply with the *ex parte* rules in the future could result in filings not being considered and imposition of sanctions. *See* 47 C.F.R. §§ 1.1212(d), 1.1216.

By the Chief Engineer and Managing Director.

For further information, contact David Siddall, Office of Engineering and Technology, (202) 653-8108.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Nevada Bell — Transmittal No. 150
Revisions to Tariff F.C.C. No. 1

ORDER

Adopted: February 8, 1993; Released: February 11, 1993

By the Chief, Tariff Division, Common Carrier Bureau:

1. On December 28, 1992, Nevada Bell filed Transmittal No. 150, to establish two nonchargeable options, 64 Clear Channel Capability (64 CCC) and Access Transport Parameter (ATP), to be available with SS7 out-of-band signalling. Nevada Bell Description and Justification (D&J) at 1-2. The 64 CCC option would allow customers to use the full 64 kilobit per second (kbps) bandwidth of a DS1 digital trunk channel. ATP is a new Common Channel Signalling (CCS) option which provides for the transmission of additional signalling information. *Id.* at 2. Nevada Bell does not plan to impose any new recurring charges for 64 CCC service, but plans to impose its existing Local Transport nonrecurring charge for both installing new trunks with 64 CCC service or adding 64 CCC service to an existing trunk. *Id.* at 3. Transmittal 150 is scheduled to take effect on February 11, 1993.

2. On January 12, 1993, MCI Telecommunications Corporation (MCI) filed a petition to suspend and investigate Transmittal 150. MCI assumes that Nevada Bell will recover the costs of installing or adding 64 CCC service through Local Transport rates, and that a separate nonrecurring charge for 64 CCC is not justified. MCI Petition at 2. MCI also requests that Nevada Bell show that its costs incurred for providing a service rearrangement are the same as its costs for providing a new installation. *Id.* at 3. MCI claims that Transmittal 150 does not explain how interexchange carriers would offer services using the ISDN D-channel[1] without interpretation or interception by Nevada Bell. *Id.* at 3. MCI criticizes Nevada Bell for adhering to technical standards established in Bell Communications Research (Bellcore) technical publications rather than those of the American Network Standards Institute (ANSI). *Id.* at 3-4. MCI claims that the technical references cited by Nevada Bell do not include ATP in what MCI calls "backwards SS7 messages," or messages transmitted from the local exchange carrier's switch to the interexchange carrier's switch (*i.e.*, the Address Complete Message and the Answer Message). *Id.* at 4. Finally, MCI criticizes Nevada Bell's failure to explain the maintenance procedures for the lines it will provide with 64 CCC service. *Id.*

3. Nevada Bell filed its reply on January 21, 1993. Nevada Bell argues that its nonrecurring charges will recover 64 CCC installation costs, and denies that these costs are recovered through Local Transport rates. Nevada Bell Reply at 1-2. Nevada Bell also asserts that its costs of providing a service rearrangement are the same as its costs for providing a new installation, because the trunk must be disconnected before adding 64 CCC and then reconnected. *Id.* at 2-3. Nevada Bell explains that the ISDN D-channel cited by MCI is a lineside service, and therefore unrelated to trunkside services like 64 CCC.[2] *Id.* at 4. Nevada Bell contends that the Bellcore technical publications to which it refers contain ANSI standards. *Id.* at 5. Finally, Nevada Bell observes that the Bellcore technical publications were revised to include ATP in backward messages, and denies that it has failed to discuss maintenance of the lines used to provide 64 CCC service. *Id.*

4. The Common Carrier Bureau has reviewed Nevada Bell's Transmittal 150 and all associated pleadings and submissions. We conclude that no question has been presented that warrants investigation at this time.

5. Accordingly, IT IS ORDERED that the petition for suspension and investigation filed by MCI Telecommunications Corporation against Nevada Bell, Tariff F.C.C. No. 1, Transmittal No. 150, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

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[1] MCI explains that the ISDN D-channel is used by the customer to communicate with the network. MCI Petition at 3 n.5.

[2] Nevada Bell also notes that the Bureau considered and rejected MCI's D-channel argument in other proceedings. Nevada Bell Reply at 4, *citing* Pacific Bell, Revisions to Tariff F.C.C. No. 128, 7 FCC Rcd 7179 (Com.Car.Bur. 1992). *See also* Ameritech Operating Companies, Revisions to Tariff F.C.C. No. 2, 7 FCC Rcd 6799 (Com.Car.Bur. 1992); BellSouth Telecommunications, Inc., Revisions to Tariff F.C.C. No. 1, 7 FCC Rcd 6772 (Com.Car.Bur. 1992); NYNEX Telephone Companies, Revisions to Tariff F.C.C. No. 1, 7 FCC Rcd 7180 (Com.Car.Bur. 1992); Southwestern Bell Telephone Companies, Revisions to Tariff F.C.C. No. 73, 7 FCC Rcd 6798 (Com.Car.Bur. 1992); US West Communications, Inc., Revisions to Tariff F.C.C. No. 1, 7 FCC Rcd 6768 (Com.Car.Bur. 1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 92-166

PUBLIC NOTICE

Released: February 11, 1993

MSS ABOVE 1 GHZ NEGOTIATED RULEMAKING COMMITTEE

Agency: Federal Communications Commission

Action: Notice of Cancellation of public meetings.

Summary: In accordance with the Federal Advisory Committee Act, Public Law 92-463, as amended, this notice advises interested persons that the meeting of the MSS Above 1 GHz Negotiated Rulemaking Committee ("Committee") scheduled for Thursday, February 18, 1993 has been cancelled.

For additional information contact: Kathleen Campbell, Administrative Assistant to the Committee, at (202) 634-1952.

Supplementary Information: Subsequent Full Committee meetings are currently scheduled for Thursday, February 25; Thursday, March 4; Tuesday, March 9; Thursday, March 18; Thursday, March 25; and Friday, April 2.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 92-166

PUBLIC NOTICE

Released: February 11, 1993

MSS ABOVE 1 GHZ NEGOTIATED RULEMAKING COMMITTEE

Agency: Federal Communications Commission

Action: Notice of public meetings.

Summary: In accordance with the Federal Advisory Committee Act, Public Law 92-463, as amended, this notice advises interested persons of the meetings the MSS Above 1 GHz Negotiated Rulemaking Committee ("Committee") scheduled for the month of March.

Dates: Thursday, March 4, 1993 at 9:30 a.m.
Tuesday, March 9, 1993 at 9:30 a.m.
Thursday, March 18, 1993 at 9:30 a.m.
Thursday, March 25, 1993 at 9:30 a.m.

Addresses: All of these meetings are scheduled for the entire day and will be held at the Federal Communications Commission, Rm. 856, 1919 M Street, N.W., Washington, D.C. 20554.

For additional information contact: Kathleen Campbell, Administrative Assistant to the Committee, at (202) 634-1952.

Supplementary Information: The agenda for each meeting of the MSS Above 1 GHz Negotiated Rulemaking Committee is as follows:

1. Opening Remarks/Comments
2. Adoption of Agenda
3. Minutes/Records of Previous Meeting
4. Introduction of Documents
5. Informal Working Group Reports
   - Issues
6. Acceptance/Approval of Recommended Rules
7. Acceptance/Approval of Report Text
8. Agenda for future meetings
   - Schedule for future meetings
9. Other Business

Members of the general public may attend this meeting. The Federal Communications Commission will attempt to accommodate as many people as possible. However, admittance will be limited to the seating available. There will be no public oral participation, but the public may submit written comments to Fern J. Jarmulnek, the Committee's Designated Federal Officer, before the meeting.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:

Application of CSR-3754
King Kable, Inc.
Operator of Cable Television
Systems in Big Canoe, Georgia
et al.

Pursuant to 47 U.S.C. Section 537

MEMORANDUM OPINION AND ORDER

Adopted: February 9, 1993; Released: February 9, 1993

By the Chief, Mass Media Bureau

1. On January 28, 1993, King Kable, Inc. ("King Kable") filed a request for authority to transfer ownership of cable television systems serving Big Canoe, Georgia and 31 other communities in Georgia and South Carolina pursuant to the anti-trafficking provisions contained in Section 617 of the Communications Act of 1934, as amended. 47 U.S.C. § 537. Prompt action on this request is sought in order to permit resolution of a bankruptcy proceeding involving the subject cable systems.[1] King Kable's request has been reviewed and the transaction involved found to be in compliance with both the specific provisions and the intended objectives of Section 617 and accordingly a waiver is hereby granted for the transactions described.

2. Section 617 was recently added to the Communications Act of 1934 as part of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Act"). Section 617, which establishes a three-year holding period for cable systems, is largely self executing and became effective on December 4, 1992, pursuant to the terms of the 1992 Act. Section 617 provides, with certain exceptions, that "no cable operator may sell or otherwise transfer ownership in a cable system within a 36-month period following either the acquisition or initial construction of such system by such operator."[2] For purposes of this provision, transactions which involve multiple systems and which require the buyer to subsequently transfer one or more such systems to one or more third parties are considered part of the initial transaction.[3]

3. Section 617 (d) authorizes the Commission to grant waivers of the restriction consistent with the public interest. Such waivers, however, are subject to the approval of the local franchise authority, if such approval is required. The 1992 Act specifically directs the Commission to use its waiver authority to permit "appropriate transfers in cases of default, foreclosure, or other financial distress." Although the 1992 Act does not specifically define the term "financial distress," Commission rules currently provide an exception to the one-year broadcast holding period where a broadcast station establishes that because of the unavailability of capital a proposed assignment or transfer would satisfy the public interest.[4] Moreover, the Commission has generally attempted to conduct its proceedings in a fashion that is consistent with federal policy as contained in the bankruptcy laws.

4. The circumstances presented by King Kable in its waiver request are consistent with our obligation under Section 617(d) to waive the anti-trafficking rule to allow transfers in cases of default and financial distress. King Kable requests a waiver in connection with its acquisition of several cable systems from TriTek-Southern Communications, Ltd. ("TriTek"), which is in default to its major lender and is currently in bankruptcy. TriTek experienced financial difficulty soon after acquiring the cable systems between 1988 and 1989 and subsequently filed for Chapter 11 bankruptcy protection.

5. The court appointed bankruptcy trustee conducted an auction of the systems in August 1992. King Kable submitted the winning bid. In order for King Kable to finance the acquisition of the systems from TriTek, however, it must sell a number of the systems to third parties. We understand that the terms of King Kable's financing agreements expressly provide for the subsequent sale of several systems from King Kable to third party purchasers. Section 617 (b) provides that such transfers of one or more systems to one or more third parties, if required by the terms of the sale, shall be considered part of the initial transaction. The bankruptcy court approved the sale of the systems to King Kable on August 27, 1992 and granted several extensions of the closing deadline so that the terms of these subsequent sales could be finalized.

6. King Kable has obtained all of the necessary consents from the local franchising authorities for the assignments from TriTek to King Kable. Requests for approval of the transfers from King Kable to the third party purchasers have been filed with 31 local franchise authorities and 13 transfer approvals have been received. *See* Exhibit 1 to King Kable Waiver Request.

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[1] Petitioner indicates that Commission action is needed by February 10, 1993 in order for the parties to comply with the court established sale deadline.

[2] 47 U.S.C. § 537 (a).

[3] 47 U.S.C. § 537 (b).

[4] 47 C.F.R. § 73.3597(a)(4). Moreover, the Commission previously granted waivers from its three-year broadcast anti-trafficking rule in cases of financial distress upon showings that a station was operating at a loss. *See, e.g., Turner Communications Corp.*, 23 RR 2d 1046, 1047 (1972); *Voice of the Cavern, Inc.*, 8 RR 2d 741, 746 n.5 (1966). Since the Commission intends to codify this anti-trafficking restriction into its rules, the Commission issued a *Notice of Proposed Rule Making and Notice of Inquiry*, in MM Docket No. 92-264, released December 28, 1992, seeking comment on the interpretation and implementation of this provision. While more specific rules may be adopted, the provisions of the statute, including the exemption provision, are already in force. The action taken herein is, of course, without prejudice to whatever action may be taken through the rulemaking process adopting additional or different procedural or substantive requirements.

7. The circumstances involved in this particular transaction clearly constitute financial distress sufficient to warrant a waiver of the cable anti-trafficking provision. Moreover, we find no evidence to suggest that either TriTek or King Kable are engaging in the type of profiteering or trafficking transactions that Congress intended to prevent. The Commission's waiver authority in these circumstances is unequivocal and is not subject to inquiry in the outstanding rulemaking proceeding. We must, however, condition the grant of such waiver upon King Kable's receipt of the remaining franchise authority approvals for the transfers from King Kable to the third party purchasers.

8. In consideration of the foregoing, IT IS ORDERED that, the request for waiver of Section 617 of the Communications Act of 1934 filed by King Kable is hereby GRANTED and shall become effective at such time as King Kable certifies to the Commission that it has obtained transfer approval from the local franchise authority in each community where such approval is required for the transfer of the systems from King Kable to the third party purchasers.

9. This action is taken by the Chief, Mass Media Bureau pursuant to authority delegated by Section 0.283 of the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI Telecommunications Corporation,
Complainant,

v.

Pacific Bell Telephone Company,	File No. E-88-46S
Pacific Northwest Bell Telephone Company,	File No. E-88-44S
Mountain States Telephone and Telegraph Company, and	File No. E-88-51S
Northwestern Bell Telephone Company,	File No. E-88-54S
Defendants.	

MEMORANDUM OPINION AND ORDER

Adopted: January 29, 1993; Released: February 8, 1993

By the Commission:

TABLE OF CONTENTS

Topic	Paragraph No.
I. INTRODUCTION	1
II. BACKGROUND	2 - 4
III. THE COMPLAINTS FOR DAMAGES	5 - 48
A. Satellite Business Systems (SBS)	6 - 10
1. Contentions of the Parties	6 - 9
2.Discussion	10
B. Liability for Damages	11 - 14
1. Contentions of the Parties	11 - 12
2. Discussion	13 - 14
C. Damages and Interest Claims	15 - 45
1. Damages	15 - 42
a. Contentions of the Parties	15 - 25
b. Discussion	26 - 43
2. Interest on Damages	44 - 46
a. Contentions of the Parties	44 - 45
b. Discussion	46 - 48
IV. CONCLUSION	49
V. ORDERING CLAUSES	50 - 55

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we award damages to complainant, MCI Telecommunications Corporation (MCI), for defendants'[1] violations of the Commission's rate of return prescription for the period October 1, 1985 through December 31, 1986 for the reasons and to the extent indicated below. In addition, we affirm the Common Carrier Bureau's determination that MCI may properly seek damages on behalf of its subsidiary, Satellite Business Systems, for defendants' rate of return violations. As also discussed below, we grant MCI's request for interest on the damages awarded here.

II. BACKGROUND

2. On January 9, 1990, the Commission issued a Memorandum Opinion and Order in the above-captioned proceedings finding that MCI had met its burden of establishing that the defendant local exchange carriers (LECs) had violated Section 201(b) of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. § 201(b), by earning in excess of the rate of return prescribed by the Commission for the period October 1, 1985 through December 31, 1986.[2] In so ruling, the Commission rejected various arguments raised by the defendants to support their claims that allegations of earnings in excess of a prescribed rate of return fail to state a cause of action for damages under the Act. The Commission also concluded that the decision of the U.S. Court of Appeals in *American Telephone and Telegraph Company v. FCC*[3] does not preclude an award of damages based on earnings in excess of a prescribed rate of return.[4] The Commission also rejected: (a) arguments by some defendants that the rates in effect during the period in question were effectively prescribed by the Commission and, therefore, could not be subject to retroactive reduction through an award of damages; (b) claims by all the defendants that Section 415 of the Act barred all or portions of MCI's complaints;[5] and (c) defendants' assertions of procedural irregularities in the Bureau's and Commission's handling of the complaints.[6]

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[1] Defendants are Pacific Northwest Bell Telephone Company (PNB), Mountain States Telephone and Telegraph Company (MTN), and Northwestern Bell Telephone Company (NWB) (collectively "USWC") and Pacific Bell Telephone Company (Pacific Bell).

[2] MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co., *et al.*, 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon. denied*, 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991) (per curiam).

[3] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*) .

[4] *See MCI Liability Order*, 5 FCC Rcd at 221-23, paras. 45-60.

[5] *See* 47 U.S.C. § 415. Subsection 415(b) provides in pertinent part that "[a]ll complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after ...." The term "overcharges" is defined in subsection 415(g) to mean "charges for services in excess of those applicable thereto under the schedules of charges lawfully on file with the Commission."

[6] *MCI Liability Order*, 5 FCC Rcd at 225-26, paras. 79-86.

3. In finding that the defendants had violated the Act by earning in excess of the prescribed rate of return, the Commission further held that the defendants are liable for damages to the extent that the complainant can establish that it was damaged as a result of the violations.[7] The Commission, noting that MCI had properly reserved the right to file supplemental complaints for damages pursuant to Section 1.722 of the Commission's rules,[8] directed MCIto file such complaints within sixty days from release of the liability orders if it wished to pursue its damages claims.[9] On March 12, 1990, MCI filed supplemental complaints for damages on behalf of itself and its subsidiary Satellite Business Systems.[10] The defendants have filed answers, motions to dismiss, a motion for summary judgment and related pleadings in which they dispute the complainant's damages claims.[11]

4. On May 11, 1992, the Common Carrier Bureau (Bureau) released an order resolving outstanding discovery disputes and establishing further discovery and briefing schedules.[12] USWC has also filed an application for review of the *Discovery Order* seeking reversal of the Bureau's determination that Satellite Business Systems (SBS), a subsidiary of MCI, is encompassed by MCI's damages complaints. Pursuant to the *Discovery Order*, the parties submitted their initial briefs and reply briefs setting forth their respective claims and arguments.[13]

III. THE COMPLAINTS FOR DAMAGES

5. MCI's damages claims rest primarily on the contention that the proper measure of damages it incurred as a result of the defendants' rate of return prescription violations is the difference between the amounts it actually paid the defendants for interstate access services during the October 1, 1985 through December 31, 1986 monitoring period and the amount it would have paid if the defendants' rates produced earnings that did not exceed the Commission's prescription. The defendants, however, have raised a number of challenges to MCI's damages claims, including a number of arguments that were previously considered and rejected by the Commission in the *MCI Liability Order*.[14] We address the parties' pertinent contentions below.

A. Satellite Business Systems (SBS)

1. Contentions of the Parties

6. As a threshold matter, we must decide whether MCI is entitled to seek damages on behalf of its subsidiary SBS. The Bureau found that MCI's damages claims properly encompass the claims of SBS and required defendants to submit information to MCI regarding SBS.[15] USWC filed an application for review of the Bureau's determination[16] arguing that the Bureau's ruling constitutes prejudicial error and is inconsistent with established law and the Commission's rules. To support its claim, USWC states that SBS was not a part of MCI during a substantial part of the

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[7] *Id.* at 217, para. 62.

[8] 47 C.F.R. § 1.722.

[9] *MCI Liability Order*, 5 FCC Rcd at 223, para. 61.

[10] MCI reached a negotiated settlement with one of the defendants prior to filing a supplemental complaint and the proceeding was dismissed on joint motion of the parties to that proceeding. *See* MCI Telecommunications Corp. v. Southwestern Bell Telephone Co., 5 FCC Rcd 4566 (Enf.Div. Com.Car.Bur. 1990). MCI subsequently reached settlement with other LECs and those cases have also been dismissed on joint motion of the parties. *See* MCI Telecommunications Corp. v. Michigan Bell Telephone Co., 5 FCC Rcd 4569 (Enf.Div. Com.Car.Bur. 1990); MCI Telecommunications Corp. v. Wisconsin Bell, 5 FCC Rcd 4567 (Enf.Div. Com.Car.Bur. 1990).

[11] Defendants have filed numerous motions to dismiss, as well as a motion for summary judgment in these proceedings as follows: USWC filed a Joint Motion to Dismiss on March 31, 1988, a Joint Supplemental Motion to Dismiss Complaint for Damages on April 11, 1990, and a Supplement to Motion to Dismiss on February 14, 1992. Pacific Bell filed a Motion to Dismiss on March 31, 1988, a Motion to Dismiss Supplemental Complaint on April 25, 1990, and a Motion for Summary Judgment on January 17, 1992. MCI opposed each of these motions. Pacific Bell filed replies in all instances. USWC filed replies except to the opposition to its March 1988 motion to dismiss. The motions to dismiss and motion for summary judgment are dismissed consistent with our rulings herein.

[12] MCI Telecommunications Corporation v. Pacific Bell Telephone Co., *et al.*, 7 FCC Rcd 2985 (Com.Car.Bur. 1992) (*Discovery Order*). USWC served interrogatories on MCI to which MCI responded on June 5, 1992 with a supplemental response on July 2, 1992. MCI filed its brief on July 6, 1992 (MCI Br.), Pacific Bell filed its brief on June 30, 1992 (Pacific Bell Br.), and USWC filed its brief on July 2, 1992 (USWC Br.). MCI filed its reply brief on July 14, 1992 (MCI RBr.), Pacific Bell filed its reply brief on July 10, 1992 (Pacific Bell RBr.), and USWC filed its reply brief on July 13, 1992 (USWC RBr.). MCI filed unopposed motions for leave to file its brief and reply brief out of time. We will grant the motions and accept both filings.

[13] As a preliminary matter, we note that USWC has stated that it filed its brief directly with the Commission because it could find no order delegating damages authority to the Bureau. In addition, USWC formally objects if the Bureau is deciding these cases under delegated authority because it contends that the Bureau has been performing investigative and prosecutorial functions in these proceedings and cannot, under Section 554(d) of the Administrative Procedure Act (5 U.S.C. § 554(d)), act as decision maker herein. USWC Br. at 2, n.5. While we agree with USWC that the damages issue must be decided by the Commission, 47 U.S.C. § 155(c)(1), the Bureau may deal with interlocutory matters such as discovery issues. We also disagree with USWC's characterization of the Bureau's activities regarding these complaint proceedings. The Bureau has at all times been acting as the "decision maker" and not as an "investigator" or "prosecutor."

[14] The issues and arguments raised by Pacific Bell and USWC in response to MCI's claims are identical in their essentials. For the sake of convenience and clarity, we will refer to defendants' arguments as if they are part of the same pleading. To the extent that individual defendants raise separate or unique arguments, we will address them separately.

[15] *Discovery Order*, 7 FCC Rcd at 2987. On May 26, 1992, in response to the *Discovery Order*, USWC filed an answer to MCI's first set of interrogatories in which it provided information to MCI regarding SBS. USWC amended its interrogatory answers on June 9, 1992. Pacific Bell filed, on May 26, 1992, a supplemental answer to MCI's interrogatories in which it states that it has no records of the total amount billed to SBS for interstate switched traffic sensitive access service for the 1985-1986 monitoring period. Pacific Bell states that all amounts billed to SBS were included in Attachments 1-4 to its Response to Order to Show Cause filed August 16, 1989.

[16] USWC filed its Application For Review on June 9, 1992 (Application). MCI filed an opposition to the Application on June 24, 1992 (MCI Opposition) and USWC replied on July 9, 1992. We note that Pacific Bell asserts in its reply brief that should MCI be awarded damages on behalf of SBS in this proceeding, any such damages award should be offset by under-

1985-1986 monitoring period and it was not named a party complainant in MCI's original complaints.[17] USWC points out that SBS was not transferred to MCI until February 14, 1986. Additionally, USWC states that MCI was the sole complainant in the original complaints and at no time has MCI filed a motion for leave to amend its complaints to include SBS as a complainant. USWC further arguesthat MCI's belated attempts to include SBS in the supplemental complaints for damages filed here fails all relevant legal tests.[18]

7. MCI admits that SBS was not part of MCI during a portion of the 1985-1986 monitoring period, but argues that as the current owner of SBS and its successor in interest, it is entitled to seek relief on SBS's behalf.[19] MCI points out that the Commission may waive its regulations for good cause either upon motion of a party or upon its own motion.[20] Accordingly, MCI contends that "...the lack of a formal motion to amend the complaint is, at worst, a technical flaw that is not fatal to the addition of SBS to MCI's damages claims."[21] MCI further asserts that case law supports the Bureau's finding that MCI may seek damages on SBS's behalf.[22]

8. MCI rejects defendants' claims that its request for damages on behalf of SBS is barred under Section 415 of the Act and Section 1.722 of the Commission's rules. MCI argues that its underlying original complaint effectively encompassed SBS. MCI further states that even if its claims on behalf of SBS could be consideredseparate claims, such claims are proper because they relate back to the date of the original complaint for purposes of Section 415 of the Act and the Commission's rules.

9. USWC counters that MCI's failure to name SBS as a complainant is not a mere technical flaw or a formality. USWC contends that the recent decision in *Illinois Bell Tel. Co. v. FCC*[23] is instructive.[24] In that case the court found that the Commission had improperly applied new rates retroactively and ordered a refund without complying with the suspension procedures of Section 204(a)(1) of the Act. USWC argues, in effect, that the same principle should apply to MCI's failure to follow the necessary Commission's rules and to the Bureau failure to enforce those rules.

2. Discussion

10. We find that the Bureau did not err when it allowed MCI's claims for damages on behalf of SBS. USWC's attempt to characterize SBS as a non-party to this damages proceeding is unavailing.[25] The defendants do not dispute that SBS took access services and paid rates that produced earnings levels at issue in these complaints. Nor do defendants dispute MCI's dominion over SBS at the time it filed its complaint or that MCI is the successor in interest to any claims that could otherwise have been asserted by SBS as a separate, independent entity. We agree with MCI that it was not required to specify in its original complaint each of its wholly-owned subsidiaries through whom tariffed services were purchased from defendants.[26] MCI's original complaint alleged unlawfully high rates and the services purchased by SBS from defendants clearly fall within the scope of the defendants' misconduct. MCI's claims on behalf of SBS go not to the question of liability, but the amount of damages suffered as a consequence of defendants' actions.[27] We conclude, therefore, that MCI has properly placed the claims of its subsidiary, SBS, before the Commission.[28]

B. Liability For Damages

1. Contentions of the Parties

11. Defendants raise a number of arguments to support their claims that they cannot be held liable for damages based solely on the fact that their rates produced earnings in excess of the Commission's prescribed rate of return. For the most part, these arguments were considered at length and rejected in the *MCI Liability Order* and require

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charges to another MCI subsidiary, Telecom*USA, Inc., that has filed a separate complaint against Pacific Bell (File No. E-90-346, filed May 29, 1990). Pacific Bell states that it had not raised this issue before because it recently learned that Telecom*USA, Inc. is a subsidiary of MCI. Pacific Bell RBr. at 14.

[17] Application at 4. USWC also argues, in its Joint Supplemental Motion to Dismiss, that we should dismiss MCI's claims on behalf of SBS. USWC Joint Supplemental Motion to Dismiss at 6. In addition, the parties address this issue in briefs and reply briefs filed herein. *See, e.g.,* USWC Br. at 19-22; MCI RBr. at 43-44.

[18] *Id.* at 7; USWC Br. at 19.

[19] MCI Opposition at 2-3.

[20] *See* 47 C.F.R. § 1.3.

[21] MCI Opposition at 5.

[22] *Id.* at 7-14, citing to *Staren v. American National Bank & Trust Co,* 529 F.2d 1257 (7th Cir. 1976); *Gregg Comm. Systems, Inc. v. AT&T,* 98 F.R.D. 715 (N.D. Ill. 1983); *Issen v. GSC Enterprises,* 538 F. Supp. 745 (N.D. Ill. 1982); *De Franco v. United States,* 18 F.R.D. 156 (S.D. Cal. 1955); *Leachman v. Beech Aircraft Corp.,* 694 F.2d 1301 (D.C. Cir. 1982); *Warpar Mfg. v. Ashland Oil, Inc.,* 102 F.R.D. 749 (N.D. Ohio 1983); *EEOC v. Westinghouse Elec. Corp.,* 869 F.2d 696 (3d Cir. 1989), *remanded on other grounds,* 493 U.S. 801 (1989); and *EEOC v. Westinghouse Elec. Corp.,* 632 F. Supp. 343 (E.D. Pa. 1986). The cases cited by complainant and defendants to support their claims regarding SBS deal with the construction and application of Section 15 of the Federal Rules of Civil Procedure (Federal Rules) pertaining to amendment of complaints. Although at times we find the Federal Rules to be instructive in handling certain proceedings, the Commission retains considerable discretion in fashioning its rules of practice and procedure and is not bound by the Federal Rules. *See, e.g.,* Amendment of Rules Governing Procedures to be Followed Where Formal Complaints are Filed Against Common Carriers, 3 FCC Rcd 1806, 1813, para. 57 (1988).

[23] 966 F.2d 1478 (D.C. Cir. 1992) (*Illinois Bell*).

[24] USWC Br. at 21.

[25] According to USWC, "Section 1.722(b) of the rules gives the same complainant the right to seek damages in a supplemental complaint, but nowhere does it provide for the rights of *non parties* to seek damages in the same complaint proceeding." Application for Review at p. 8, n.32, (emphasis in original).

[26] MCI Br. Appendix C at 6.

[27] USWC's attempts to distinguish the court precedents cited by MCI to support its claims that SBS is properly encompassed by its complaint are simply not persuasive. *See* Application for Review at pp. 10-12.

[28] Defendants' reliance on *Illinois Bell* is misplaced because that decision centered on what the court perceived as the Commission's failure to follow statutorily prescribed procedures in effecting refunds under Section 204(i) of the Act.

no further discussion here.[29] Defendants make the additional argument that the decision in *Ohio Bell Telephone Company v. FCC*,[30] issued after the release of the *MCI Liability Order*, requires dismissal of MCI's complaints.[31] According to the defendants, *Ohio Bell* reaffirms the proposition established in *AT&T v. FCC* that the Commission cannot order refunds for carrier overearnings without allowing the carrier to re-coup or off-set underearnings,[32] nor may the Commission order refunds on an individual operating company basis without taking into account total company earnings.[33] Defendants contend that these propositions are not narrowly confined to the Commission's ratemaking activities under Sections 204-205 of the Act[34] but are equally applicable when the Commission decides private complaints for damages under Section 208 of the Act.

12. MCI counters that, like *AT&T v. FCC*, *Ohio Bell* involved a Commission order under its public ratemaking authority, which must satisfy the "end result" test set forth in *Federal Power Commission v. Hope Natural Gas Co.*[35] MCI argues that individual complaints for damages are not subject to the "end result test" articulated in *Hope*. MCI points out that the court in *AT&T v. FCC* stated that "an agency rate order 'viewed in its entirety' must produce a just and reasonable 'total effect' on the regulated business."[36] In addition, the court was dealing with the industry-wide application of the automatic refund rule as a whole over the long run. According to MCI, it was the operation of the refund rule in its entirety that was unreasonable. MCI further argues that this proceeding is not equivalent to the refund rule governing all overearnings; rather, it is an individual complaint by MCI for damages caused by the defendants' overearnings.[37] MCI contends that *Ohio Bell* simply applied *AT&T v. FCC* to another Commission public enforcement proceeding, and the court's reasoning is inapplicable to private Section 208 damages claims.[38]

2. Discussion

13. Contrary to defendants' contentions, *Ohio Bell* does not undermine our decision in the *MCI Liability Order* that a complainant/customer may recover damages if it can establish that a carrier from whom it purchased service has violated a valid rate of return prescription and that the complainant/customer suffered damages as a result of the violation. In *Ohio Bell* the court found, as in *AT&T v. FCC*, that any requirement that carriers refund earnings in excess of a prescribed rate of return that failed to take into account a carrier's underearnings, appeared to be inconsistent with the Commission's own understanding of its rate of return prescription.[39] The court's reasoning was apparently based on its belief that the Commission considered a rate of return prescription to establish both minimum and maximum limits on the earnings levels of the affected carriers.[40] The Commission, however, recently clarified its position that a rate of return prescription is not a minimum, but rather a point within a broad zone of reasonableness:

> We acknowledge that the Commission may not have made its understanding of the rate of return it prescribes sufficiently clear in prior orders. However, subsequent to the [decision in *AT&T v. FCC*], we emphatically explained our position:
>
> > 'In light of the ruling in [*AT&T v. FCC*], in which the Court of Appeals determined that our automatic refund provision was at odds with our own understanding of our rate of return prescription, we wish to clarify that we do not view this prescription as both a maximum and a minimum.' That is, it does not represent a unique balance point such that '[i]f the rate were higher, the balance would tip in favor of the investor; if lower, it would tip in favor of the consumer.' Our accumulated experience

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[29] *MCI Liability Order*, 5 FCC Rcd at 220-225. The Commission held that the defendants have violated the Act by earning in excess of a valid rate of return prescription, thereby making their rates unjust and unreasonable under Section 201 of the Act and themselves liable for such damages as MCI can demonstrate. In effect, we have previously determined that defendants' rates were unjust and unreasonable to the extent such rates produced earnings in excess of prescribed levels. To pursue a claim for damages in these proceedings, MCI need only show that it took service in the access service categories in which defendants overearned and set forth the manner and the extent to which it was damaged as a result of paying defendants' unlawfully high rates.

[30] 949 F.2d 864 (6th Cir. 1991) (*Ohio Bell*).

[31] USWC Supplement to Motion to Dismiss at 3-5; Pacific Bell Motion for Summary Judgment at 1 and 7.

[32] Pacific Bell Motion for Summary Judgment at 8-9.

[33] USWC Supplement to Motion to Dismiss at 3-4.

[34] 47 U.S.C. §§ 204-205.

[35] 320 U.S. 591 (1944) (*Hope*).

[36] MCI Opposition to Supplement to Motion to Dismiss at 7, citing to *AT&T v. FCC*, 836 F.2d at 1391-92.

[37] *See, e.g.*, MCI Opposition to Supplement to Motion to Dismiss at 8-9.

[38] *Id.*

[39] *Ohio Bell*, 949 F.2d at 874.

[40] 949 F.2d at 872-873. In *AT&T v. FCC*, the court stated that

> ...the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate-of-return prescription. That authority must, however, be exercised in a way that does not contradict the Commission's own theory of rate of return regulation.

AT&T v. FCC, 836 F.2d at 1392. The court set aside the automatic refund rule adopted by the Commission in Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), *modified on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,033 (Apr. 1, 1986), *further recon. denied*, 2 FCC Rcd 190 (1987). The court found the automatic refund mechanism to be arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce." *AT&T v. FCC*, 836 F.2d 1386, 1390.

> with rate of return prescriptions...convince us that there is no such point. Indeed, even the lower boundary of our range of cost of capital estimates does not represent a bright line such that a company earning just below that level would be forced out of business. We believe there is a substantial gap between an earnings level that is fully adequate to assure attraction of capital on favorable terms, and an earnings level which, if sustained over time, would be confiscatory."[41]

The Commission went on to emphasize that this point is "neither the maximum nor minimum necessary to meet constitutional standards."[42] Rather, the Commission stated, it is a point selected based on consideration of all relevant factors, within a zone that is narrower than the zone bounded on the lower end by the constitutional minimum.[43] Therefore, the concern raised by the court in *AT&T v. FCC*, and echoed in *Ohio Bell*, about inconsistencies in the Commission's rate of return theory have been satisfied in the Commission's subsequent rate of return proceedings.

14. In any event, we disagree with the defendants' claim that *Ohio Bell* and *AT&T v. FCC* compel us to dismiss MCI's complaints. As we emphasized in the *MCI Liability Order*, automatic refunds and refunds ordered under Section 204 of the Act are different from individual actions for damages under Section 208. Unlike the automatic refund mechanism in *AT&T v. FCC* or the refund procedure in *Ohio Bell*, both of which resulted from rulemaking proceedings initiated at the Commission's discretion, individual actions for damages under Section 208 are initiated by private parties seeking damages for injuries to themselves; those private parties have the burden of establishing both a violation of the Act and actual injury.[44] The courts in *AT&T v. FCC* and *Ohio Bell* did not discuss private complaints for damages; they did not invalidate private actions for damages; and their analysis is not applicable to the different separately authorized complaint procedure set forth in Sections 206-209. Accordingly, those decisions do not require us to depart from our holding in the *MCI Liability Order* that defendants have violated the Communications Act by earning in excess of a valid rate of return prescription, thereby making their rates unjust and unreasonable under Section 201 of the Communications Act and themselves liable for damages to the extent a complainant/customer can establish that it was damaged as a result of the violation.[45]

C. Damages and Interest Claims

1. Damages

a. Contentions of the Parties

15. As referenced above, MCI's damages claims rest primarily on the contention that the proper measure of the damages it incurred as a result of defendants' violations is the difference between the amount it actually paid defendants for interstate access services during the October 1, 1985 through December 31, 1986 period and the amount it would have paid if the defendants' rates had produced earnings that did not exceed the Commission's prescribed rate of return.[46] In the *Discovery Order*, the Bureau stated that it tended to agree, in principle, that a possible measure of the damages stemming from defendants' rate of return violations could be that difference.[47] The Bureau was not persuaded on the record before it, however, that a damages determination based solely on such a measure necessarily reflected actual damages incurred by MCI.[48] The defendants were invited to submit evidence that could serve to mitigate or otherwise reduce MCI's damages claims. Specifically, the Bureau stated that evidence that would show that MCI's share of excessive earnings realized in a particular access category by a defendant could be offset or otherwise reduced due to facts and circumstances surrounding MCI's purchase of other interstate access services from such defendant for the relevant monitoring period might be relevant.[49]

16. Under what it describes as the "traditional" damages approach, MCI states that it should be awarded damages of $2,210,851 from Pacific Bell and $2,322,960 from USWC, exclusive of interest.[50] MCI states that the data underlying these calculations were taken from the defendants' Forms 492, their responses to discovery and other filings in these proceedings as well as from published tax tables.[51] To derive the stated amounts, MCI calculated, for each study area and access service category in which a defendant's earnings exceeded the rate of return prescription of 12.75% plus .50% buffer, the overall percentage that the service rates in that category should have been reduced in order to yield earnings of no more than 13.25%. The resulting percentage represents the rate reduction percentage used by MCI in its computations. MCI then took MCI's and SBS' combined shares of the total industry usage of each service

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[41] Amendment of Parts 65 and 69 of the Commission's Rules to Reform the Interstate Rate of Return Represcription and Enforcement Processes, CC Docket No. 92-133, Notice of Proposed Rulemaking and Order, 7 FCC Rcd 4688 (1992) (*NPRM & Order*) at 4701, para. 96 (footnotes omitted) citing to Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, CC Docket No. 89-624, Order, 5 FCC Rcd 7507 (1990) at 7532, para. 217, *recon. denied*, 6 FCC Rcd 7195 (1991), *appeal docketed sub nom. Illinois Bell Telephone Co., et al., v. FCC*, No. 91-1020 (D.C. Cir. Jan. 11, 1991).

[42] *NPRM & Order*, 7 FCC Rcd at 4701, para. 97.

[43] *Id.*

[44] *See MCI Liability Order*, 5 FCC Rcd at 222-23, para. 55.

[45] *Id.* at 226, para. 86.

[46] In support of what it characterizes as the traditional approach to damages, MCI cites to *Southern Pacific Co. v. Darnell-Taenzer Co.*, 245 U.S. 531 (1918) (*Darnell-Taenzer*), which MCI states construed the cognate provisions of the Interstate Commerce Act (ICA), and the cases that followed this decision. In *Darnell-Taenzer*, the Court upheld an Interstate Commerce Commission (ICC) order requiring a carrier to pay reparations to a shipper in the amount that the rate charged by the carrier exceeded a rate found reasonable by the ICC.

[47] *Discovery Order*, 7 FCC Rcd at 2987, para. 12.

[48] *Id.*

[49] *Id.*

[50] This amount includes $926,058 from NWB, $1,134,175 from MTN, and $262,727 from PNB.

[51] MCI Br. at 11-12.

category in each study area in which a defendant overearned and calculated its actual payment for each service category and each study area. MCI then applied a "rate adjustment factor" (1 minus the rate reduction percentage) to the amount it actually paid to derive the amount it would have paid if defendant had not overearned.[52] MCI also claims interest calculated at the Internal Revenue Service (IRS) rate from the month that each excess payment was made.[53] MCI contends it is entitled to interest on the damage amounts which, through July 30, 1992, totals $1,947,537 in the case of Pacific Bell and $2,046,105 in the case of USWC.[54]

17. The defendants challenge MCI's damages claims on a number of grounds, raising several arguments that were previously considered and rejected by the Commission in the *MCI Liability Order*. Defendants contend that by simply basing its damages claims on a calculation of MCI's prorated share of category-level overearnings, MCI asks the Commission to award it damages in the same amounts it would have received under the automatic refund rule invalidated by the court in *AT&T v. FCC*.[55] The defendants maintain that such a result is expressly precluded by *AT&T v. FCC*. The defendants add that the decision in *Ohio Bell* precludes an award of damages based solely on category level overearnings. Defendants also contend that the decision in *Illinois Bell* precludes an award of damages for past overearnings because that decision limits the Commission to ordering prospective relief under Section 205 of the Act.[56]

18. Defendants next contend that, even if *AT&T v. FCC* and *Ohio Bell* do not preclude MCI's damages claims, the claims still fail because MCI's complaints do not establish a valid cause of action. According to defendants, to pursue a damages claim, MCI must first show that the defendants charged unjust and unreasonable rates for interstate access services during the period in question, not that defendants' rates produced excessive returns in individual service categories.[57] Moreover, defendants argue, Section 206 of the Act[58] requires MCI to prove injury, causation, and the amount of damages in addition to establishing a violation of the Act.[59] Defendants maintain that by simply referencing defendants' earned rates of return for individual access service categories, MCI has not only failed to allege any facts that would establish that defendants' rates were unjust and unreasonable during the period in question but has also failed to show that it sustained actual damage as a result of those rates.[60]

19. The defendants each raise distinct arguments to support their claims that an award of damages to MCI based on carrier overearnings is inappropriate for equitable and

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[52] *Id.* at 12-15.

[53] *Id.* at 15.

[54] MCI RBr. at 46-47 and Appendix D. MCI states that it computed interest at the IRS quarterly interest rate, compounded daily, beginning May 15, 1986 and ending July 30, 1992.

[55] *See, e.g.*, Pacific Bell Br. at 7; USWC Br. at 5, 7-9. In addition, defendants contend that *Ohio Bell* makes clear that it was the end result of the automatic refund mechanism, not the mechanism itself, that was unlawful. Pacific Bell Br. at 9.

[56] *See, e.g., id.* at 7.

[57] USWC argues that MCI must specify an identifiable rate that MCI paid that was too high or too low. USWC Br. at 10. In addition, USWC cites to a 1970 circuit court decision to support its claim that where retroactive relief is ordered for rates paid pursuant to a tariff that is subsequently found unjust and unreasonable, the Commission must determine what a just and reasonable rate is. *Id.*, citing to *Middlewest Motor Freight Bureau v. United States*, 433 F.2d 212, 232 (8th Cir. 1970) (*Middlewest*), *cert. denied*, 402 U.S. 999 (1971). USWC's reliance on *Middlewest* is misplaced. *Middlewest* dealt with the question of restitution (not damages) to shippers for charges collected by carriers during the pendency of an injunction improperly issued by a district court against an ICC order, which had found the carriers' rates to be unlawful. The circuit court found the injunction to be improperly issued and ordered restitution by the carriers for higher charges collected while the injunction remained in effect. In discussing the difference between overcharges, reparations, and restitution the court pointed out that, in the context of reparations, the agency, and not the court, must determine the just and reasonable rate when filed rates are found to be unjust and unreasonable. The *Middlewest* decision thus focused on restitution under very narrow circumstances -- restitution for higher charges collected by carriers despite a determination by the expert agency charged with regulating the rates that the rates were unlawful.

[58] *See* 47 U.S.C. § 206.

[59] *See, e.g.*, Pacific Bell Br. at 11.

[60] *See, e.g., id.* at 10-11; USWC Br. at 11-12. USWC contends that the principle that MCI must still prove it was damaged and in what amount was established by the Supreme Court in *Southern Ry. Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 454-55 (1979) (*Seaboard*), *reh'g denied*, 444 U.S. 890 (1979), in construing relevant sections of the ICA. The Court stated:

> [O]ur sole concern is the Commission's decision not to investigate under § 15(8)(a) [204], a decision that has only two final consequences. First, the burden of proof with regard to *reasonableness* is placed on the shipper under § 13(1) [208] rather than on the carrier, who would have borne it in a § 15(8)(a) [204] proceeding. (With respect to all other aspects of lawfulness, however, the burden is borne by the shipper in both proceedings.) Second, the shipper's relief, if unlawfulness is proved, is limited under § 13(1) [208] to actual damages rather than the full refund of overcharges available under § 15(8)(a) [204].

USWC states that this ruling has been found applicable to proceedings under the Communications Act. *See Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221, 1235 n.35 (D.C. Cir. 1980) (*ARINC*), *cert. denied*, 451 U.S. 920 (1981). Here too, USWC's reliance on case precedent is misplaced. In *Seaboard*, the Court dealt with the narrow question of whether there must be judicial review of the ICC's decision not to conduct a Section 15(8)(a) investigation of a tariff. The Court held that judicial review was inappropriate because the shippers could pursue individual complaints under Section 13(1) of the ICA and the decision not to investigate under Section 15(8)(a) did not prejudge the lawfulness of the tariff. As the Court noted, the ICC's decision not to investigate had only two consequences -- the burden to establish reasonableness is shifted from the carrier to the shipper and the shipper might not be entitled to the full amount of the overcharge because it must prove actual damages. *Seaboard*, however, does not stand for the proposition that refunds for overcharges and an award of damages are always necessarily two different amounts. In fact, the Court acknowledges these amounts may be identical. *See* 442 U.S. 444, 455, n.8.

The Court of Appeals decision in *ARINC* similarly dealt with the reviewability of a Commission decision to accept a tariff. The court held that such action by the Commission is unreviewable since parties claiming to be aggrieved by the Commission's acceptance of a tariff may avail themselves of the

policy reasons. USWC vigorously argues that MCI is actually seeking restitution or a refund of tariffed charges, not damages. USWC argues that regardless of how MCI characterizes the relief it seeks, any form of refund or restitution to MCI would be contrary to the public interest.[61] USWC further contends that an award of damages would be inequitable because (i) USWC's total corporate rate of return would be driven below the confiscatory level; (ii) there was uncertainty surrounding the tariff filings during the relevant period; and (iii) MCI would receive a windfall that would be inconsistent with sound equitable principles.[62]

20. For its part, Pacific Bell argues that MCI's claim for damages is flawed because MCI simply assumes that lower rates would have produced lower earnings [63] and offers no probative evidence to show what a reasonable rate would have been or to otherwise support its damages claims. Pacific Bell argues, as does USWC, that MCI would receive a windfall if it has passed the "overcharges" on to its customers and is now awarded damages.[64] Pacific Bell argues that had its access charges to MCI been lower in 1985-1986, it is almost certain that MCI's rates to its customers would have been lower.[65] Pacific Bell cautions the Commission to look at the "backdrop of the practical consequences" thereof and ensure that any decision granting MCI "refunds" is equitable under the circumstances.[66] Pacific Bell further argues that, should the Commission award damages to MCI, the Commission should order MCI to pass the damages through to its end users in the form of a rate reduction.[67]

21. Finally, Pacific Bell argues that any award of damages to MCI based on overearnings should be reduced by Pacific Bell's underearnings in the common line category (earnings under 12.75%) and an automatic refund in the switched traffic sensitive category which Pacific Bell claims it made in 1988 prior to the court's decision invalidating the automatic refund rule.[68] Pacific Bell also contends that any damages awarded to MCI and SBS be offset by undercharges to another MCI subsidiary, Telecom*USA, Inc.[69] Taking these factors into consideration, Pacific Bell claims that MCI has already received a windfall of approximately three million dollars from undercharges which exceeds its damages claims. Therefore, Pacific Bell contends, equity dictates that MCI receive no damages in these proceedings.

22. MCI counters that defendants' threshold arguments regarding the effect of the court's ruling in *AT&T v. FCC* have largely been rejected or precluded by the *MCI Liability Order*. MCI states that the so-called similarities between its damages requests and the automatic refund do not "somehow transmogrify the private complaint remedy into a public enforcement refund remedy subject to entirely different standards and requirements" as alleged by the defendants.[70] MCI adds that defendants' arguments that it has failed to allege and prove violations of the Act and actual damage are unfounded because it has made a sufficient showing of each under traditional principles govern-

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statutory complaint procedure in Section 208 of the Act. The court echoed the Supreme Court's ruling in *Seaboard* that the burden is on the complainant in an individual complaint action, and the amount of damages may not necessarily be the same as the amount received had the Commission investigated the tariff, found the rates to be unreasonable, and ordered refunds.

[61] USWC Br. at 13-19. USWC argues MCI must plead its case in equity and the Commission may only award a refund if we find that the public interest will be served by a refund award to MCI. USWC contends that the leading case in this area is *Moss v. Civil Aeronautics Board*, 521 F.2d 298 (D.C. Cir. 1975) (*Moss*), *cert. denied sub nom. Roberts v. Civil Aeronautics Board*, 424 U.S. 966 (1976), *reh'g denied*, 425 U.S. 966 (1976). USWC states that the refund in *Moss* "was governed by the equitable principles governing the law of restitution." USWC Br. at 14, citing to *Moss*, 521 F.2d at 304. Once again USWC's reliance on a court ruling is misplaced. *Moss* dealt with a claim for restitution by airlines passengers for fares paid pursuant to an order of the Civil Aeronautics Board (CAB) later found procedurally infirm by the court. The court had previously held that fares charged by the airlines pursuant to the CAB order were unlawful because the CAB had not complied with the requirements of the Federal Aviation Act in determining such rates. *See Moss v. CAB*, 430 F.2d 891 (D.C.Cir 1970). The CAB, at the time of *Moss*, lacked any express reparations (damages) or refund power. The court noted that "...recovery can only be had in terms of restitution grounded in equitable considerations." 521 F.2d at 314. We are not limited herein to restitution because the Commission has express statutory authority to award damages, which is embodied in Sections 206-209 of the Act. The equity concerns discussed by the court in *Moss* are simply inapplicable to these individual damages complaints.

[62] USWC Br. at 16-19.

[63] For example, Pacific Bell alleges that had its rates been lower "it is almost a certainty" that MCI's rates to end users would have been lower also. Pacific Bell Br. at 14.

[64] *See, e.g., id.* at 13.

[65] *Id.* at 14. Pacific Bell cites to numerous newspaper and magazine articles to support this contention.

[66] *Id.* at 16, citing to *Las Cruces TV Cable v. FCC*, 645 F.2d 1041 (D.C. Cir. 1981) (*Las Cruces*). In *Las Cruces*, the court upheld, in part, and remanded, in part, a Commission decision requiring refunds under Section 204 of the Act. The court noted that *Las Cruces*

> is the first time that the Federal Communications Commission has attempted to articulate standards governing its award of refunds to customers of a communications common carrier under Section 204 of the Act.

645 F.2d at 1046. Pacific Bell's reliance on *Las Cruces* is unavailing, however, because equitable considerations that may impact a Section 204 investigation are not applicable in individual Section 208 complaint proceedings in which only damages are awarded.

[67] Pacific Bell Br. at 16.

[68] *Id.* at 17-18.

[69] Pacific Bell RBr. at 14-15. We note that Telecom*USA, Inc. has filed a separate complaint against Pacific Bell and that at the time the separate complaint was filed, Telecom*USA, Inc. was not a subsidiary of MCI. *See* note 16, *supra*.

[70] MCI RBr. at 8. MCI also points out that the Sections 206-209 damages remedies are invulnerable to any challenge based on the decisions in *AT&T v. FCC* and *Ohio Bell*. This, MCI claims, is underscored by Judge Starr's concurring opinion in which he notes that refunds (under Section 204(a)) and damages (under Sections 206-209) are the two remedies specified in the Act for injured customers. *See AT&T v. FCC*, 836 F.2d at 1393-94. MCI also notes that Judge Starr also makes clear that a damages award does not constitute retroactive ratemaking in violation of the 'filed rate doctrine.' *Id.*

ing its statutory right to such relief. According to MCI, the only injury and causation it need show are the injury and causation arising from its payment of excessive rates for services it purchased from defendants during the relevant period. MCI maintains that it has shown that defendants charged it rates that produced earnings in excess of the Commission's prescribed rate of return and argues that its damages are the excessive charges that MCI paid. Those damages, MCI states, can easily be derived from the defendants' Forms 492 and8the information that has been provided in these proceedings.[71] MCI states that it has calculated the percentages by which the overall rates in each service category and study area should be reduced to produces rates that did not overearn during the relevant monitoring period. Therefore, MCI asserts, it has proven damages under the traditional approach.[72]

23. MCI further argues that equitable considerations are relevant only to the Commission's public enforcement remedies and not to private complaints for damages because the Commission has no discretion in the award of damages under Sections 206-209 of the Act.[73] MCI states that Pacific Bell's equitable arguments regarding the failure of MCI to flow-through damages it might recover are also irrelevant to private complaint actions[74] and Pacific Bell cannot properly raise a "passing-on" defense.[75] MCI states that USWC has implicitly conceded that defendants' equitable defenses are germane only if MCI's claim is equitable in nature, i.e., a disguised claim for a refund or restitution under the Commission's public enforcement authority.[76] MCI reiterates that its claims are actions for damages under Section 206-209 of the Act, not for restitution or refunds.

24. MCI next argues that defendants' offset arguments should be rejected because the Commission has already held that cross-subsidies in earning categories are not allowed. Moreover, MCI claims, offsets are in the nature of counterclaims and as such, are not within the Commission's jurisdiction because they would involve the determination of a carrier's rights against a customer.[77] MCI adds that offsets would violate the "filed-rate doctrine" because defendants would, in effect, be allowed to recoup undercharges through retroactive rate adjustments as well as discriminate against those customers against whom such offsets were allowed.[78]

25. MCI further contends that Pacific Bell should not be given credit for its claimed partial refund of excess switched traffic sensitive charges in 1988.[79] MCI contends that Pacific Bell has not shown that MCI received a benefit from the switched traffic sensitive rate reduction. In any event, MCI argues, since Pacific Bell overearned in this category in 1987-1988, the rate reduction is meaningless.

b. Discussion

26. *AT&T v. FCC and Ohio Bell:* The defendants' claims that the holdings in *AT&T v. FCC* and *Ohio Bell* control these proceedings and bar an award of damages to MCI are without merit for the reasons stated in the *MCI Liability Order*. We emphasized in that Order that the court in *AT&T v. FCC* explicitly acknowledged the Commission's authority to order a carrier to disgorge earnings in excess of a rate of return prescription,[80] finding only the remedy component of the Commission's rate of return prescription (the automatic refund mechanism) to be unlawful.[81] More to the point, we emphasized that "the [*AT&T v. FCC*] opinion does not address Section 208 complaint proceedings nor purport to alter the statutory scheme of the Act or the remedies Congress established therein."[82] The *Ohio Bell* decision, which relied in part on the reasoning in *AT&T v. FCC*, similarly does not address the Commission's authority to award damages in private complaint actions under Section 208 of the Act. *Ohio Bell* follows *AT&T v. FCC;* it does not expand upon its holding. In *Ohio Bell*, the court held that a Commission order requiring carriers to refund overearnings in the special access category under strategic-pricing guidelines for the 1985-86 and 1987-88 monitoring periods was arbitrary and capricious because the order was inconsistent withthe Commission policies establishing permissible rates of return.[83]

27. We also reject defendants' claim that the decision in *Illinois Bell* somehow leaves the Commission only with Section 205 authority in the face of a violation of our rate of return prescription. In *Illinois Bell*, the court found that the Commission had ordered a refund under Section 204(a) of the Act without having issued a suspension order. The sole issue presented for resolution by the court was the difference in interpretation by the Commission and the petitioning parties of the Commission's authority under Section 204.[84] The court did not address individual complaint remedies, but merely held that the Commission is not authorized to order refunds under Section 204 without having issued a suspension order, and that in doing so it must have acted under Section 205, which provides for prospective relief only.[85] The defendants' claim that the

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[71] *Id.* at 15.
[72] *Id.* at 16-17.
[73] *Id.* at 21.
[74] *Id.* at 26.
[75] MCI argues that the press clippings cited to by Pacific Bell are insufficient to establish this defense. *Id.* at 28-29.
[76] *Id.* at 18.
[77] *Id.* at 33-35, citingto Thornell Barnes Co. v. Illinois Bell Telephone Co., 1 FCC Rcd 1247, 1275 (1965) (*Thornell Barnes)*; Illinois Bell Telephone Company v. AT&T, 4 FCC Rcd 5628, 5270 at ¶17 -18 (1989) (*Illinois Bell II), recon. denied,* 4 FCC Rcd 7759 (1989); *Pennsylvania R. Co. v. Fox & London, Inc.*, 93 F.2d 669 (2d Cir. 1938).
[78] MCI RBr. at 37-39.
[79] *Id.* at 42.
[80] *AT&T v. FCC,* 836 F.2d at 1392 ("Thus, as we previously have concluded, the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate of return prescription").
[81] Indeed, the court in *Ohio Bell* recognized the continuing efficacy of our rate of return framework. *See* 949 F.2d at 868.
[82] *MCI Liability Order,* 5 FCC Rcd at 223, para. 56.
[83] *See Ohio Bell,* 949 F.2d at 873. The court pointed out that

> [p]etitioners rely primarily on *A.T.& T. v. F.C.C.* ... to argue that the Commission's order is arbitrary and capricious. *The case involved a refund order similar to the one in this case.*

949 F.2d at 872 (emphasis added).
[84] *Illinois Bell,* 966 F.2d at 1481.
[85] *Id.* at 1483. The court stated

Illinois Bell decision deprives the Commission of authority to award damages for violations of a valid rate of return prescription has no merit.

28. *Section 201(b) of the Act:* We turn now to the defendants' contention that MCI's damages claims must be dismissed because MCI has failed to prove defendants' rates were unjust and unreasonable within the meaning of Section 201(b) of the Act. These arguments were previously raised by the defendants in the liability phase of this proceeding. In the *MCI Liability Order,* we specifically heldthat MCI had met its burden of proof by establishing that the defendants had violated our rate of return prescription "thereby making their rates unjust and unreasonable under Section 201 of the Act."[86] Accordingly, the question before us now is not whether defendants' rates were unjust and unreasonable; rather the questions now are whether the complainant suffered any measurable damage as a consequence of paying rates previously determined by the Commission to be unlawful under Section 201(b).

29. The defendants next claim that even if MCI has sustained its burden and shown that defendants' rates were unjust and unreasonable, its damages claims must still fail because judicial precedent compels MCI to establish what a just and reasonable rate would have been as a prerequisite to pursuing damages claims based on unreasonable rates.[87] Defendants' claims in this regard are unavailing. We agree with the Bureau's determination in the *Discovery Order* that a proper starting point for assessing damages based on violations of a rate of return prescription is to look at the difference between the amount MCI paid for defendants' interstate access services and the amount it would have paid if defendants had charged rates that produced returns within the Commission's prescribed levels.[88] The issue in these proceedings is not whether individual rates are unlawful, but whether cumulative rates that produced earnings over and above a prescribed rate of return are unjust and unreasonable. In emphasizing the Commission's authority under the Communications Act to prescribe and enforce carriers' rates of return,[89] we stated in the *MCI Liability Order* that

> [i]t does not disturb the balance of ratepayer and shareholder interests embodied in the Act to award damages to customers who demonstrate that they were injured by paying rates that resulted in a carrier earning in excess of its prescribed return. Even when a carrier operates under a prescription of a rate of return for broad categories, the carrier retains substantial flexibility in formulating rates. Carriers are permitted to make mid-course corrections if their actual return deviates from the authorized return. If actual earnings are higher than the authorized return, a carrier can file reductions and thereby avoid the risk of being ordered to pay damages. If actual earnings are below the authorized return, a carrier can file rate increases. Defendants had ample notice of our rules, which were developed in notice and comment Rule Making proceedings in which all of them participated, as well as the level of the prescription for each category. As a general matter, it would be inequitable to permit defendants, who were in the best position to set their rates at lawful levels in the first place, and who later had opportunities to correct those rates, to avoid responsibility for those unlawful rates, at the expense of their customers.[90]

MCI has shown that it purchased services from defendants at rates that produced earnings over and above the defendants' prescribed levels. The defendants, faced with the prospect of damages for violations of a binding rate of return prescription, cannot now so readily disavow the substantial flexibility afforded carriers to achieve their authorized rate of return. In effect, the defendants would have us require MCI to do what defendants were neither required nor apparently able to do, that is establish the precise rates required to bring defendants' earnings within authorized levels for each of their interstate access service offerings. The defendants ask too much. The Commission's rate of return prescription, although it afforded carriers considerable leeway in setting their rates, bound the defendants to a maximum earnings limitation. We previously determined in the *MCI Liability Order* that a violation of such a prescription constitutes a violation of the Act for which damages may lie. It is appropriate and consistent with the Commission's rate of return regulatory scheme to inquire as to earnings in excess of prescribed levels for purposes of assessing damages claims.

30. *Damages and Offsets:* The defendants' arguments are devoted primarily to attempting to persuade the Commission that MCI's damages claims are really claims for restitution or refunds governed by equitable or public policy considerations. These considerations, according to defendants, militate against any award of damages to MCI based on excessive earnings. The defendants argue, in effect, that the damages MCI seeks are equivalent to refunds that would have been required under the refund mechanism invalidated by the court in *AT&T v. FCC.* We do not agree. We are concerned here with determining whether a particular customer, which has availed itself of a statutory complaint remedy under Title II of the Act, has sustained any measurable damage that can be traced to defendants' violations of the Act. Although a damages award under Section 208 of the Act might well be equal or substantially similar to a refund ordered under Section 204 of the Act,[91]

> We conclude that when the FCC investigates and remedies an unreasonable rate which it has theretofore permitted to become fully effective without a suspension order, it acts under § 205, not § 204. We further conclude that the Commission has no authority under § 205 to order the refunds contemplated only under § 204.

Id. The court clearly did not limit or even address this Commission's authority to order damages in a Section 208 proceeding.

[86] *MCI Liability Order,* 5 FCC Rcd at 226, para. 86.

[87] USWC Br. at 10, citing *Middlewest,* 433 F.2d 212, 232.

[88] *See Discovery Order,* 7 FCC Rcd at 2987, para 12.

[89] *MCI Liability Order,* 5 FCC Rcd 222-223.

[90] *Id.* at 223, para. 59 [footnotes omitted].

[91] *See Seaboard,* 442 U.S. 444, 455, n.8:

this does not transform a private complaint action into a public enforcement proceeding subject to broad public interest considerations.

31. We find defendants' arguments with respect to "passing-on" equally unavailing. MCI has made a claim for specific damages, and the defendants, in turn, may properly argue that they are entitled to certain offsets against those damages. Defendants, however, cannot simply make damages "go away" by alleging that MCI passed on the defendants' charges that led to excessive earnings to MCI's customers. Whether MCI passed on the overcharges or absorbed them does not alter the fact that the defendants overcharged MCI in violation of a binding rate of return prescription and must answer for such violations. MCI clearly has a claim for damages because it had to pay more for service than it would have if defendants' rates had produced earnings at or within the Commission's prescribed levels. Even if MCI passed on the overcharges, it is very likely that MCI's sales to customers were adversely affected to the extent that its own rates were higher. The issue, however, is not what MCI has done in response to paying excessive rates, but whether MCI has been damaged as a result of these excessive rates.[92] In addition, MCI argues, and we agree, that the 0Commission's decision in *Hughes Sport Network, Inc.*[93] along with the Supreme Court's decision in *Darnell-Taenzer* require that the "passing-on" defense be rejected. In *Hughes*, the Commission stated that

> the imposition of a charge which is unlawful because it is unreasonably high entitles the customer to reparation of the excessive amount|without regard to whether or not the damages were passed on to other parties.[94]

Similarly in *Darnell-Taenzer*, the Court stated

> The only question before us is that at which we have hinted: whether the fact that the plaintiffs were able to pass on the damage that they sustained in the first instance by paying the unreasonable charge, and to collect that amount from the purchasers, prevents their recovering the overpayment from the carriers. The answer is not difficult. The general tendency of the law, in regard to damages at least, is not to go beyond the first step.[95]

32. Nor can we accept the defendants' related claim that we should require MCI to flow through any damages it may receive to its end user customers. Sections 206-209 of the Act give private parties the right to file complaints challenging the acts or omissions of carriers and to recover monetary damages resulting from such acts or omissions. Complainants, however, are charged, as MCI is in the instant case, with the burden of establishing violations of the Act or Commission rule or order and the amount or extent of damage suffered as a consequence of such violations. Accepting defendants' flow through argument would, in effect, transform MCI's complaints into class action suits on behalf of its customers, a result neither expressly contemplated by nor consistent with the private remedy created under Sections 206-209 of the Act.

33. We also reject USWC's contention that a damages award to MCI is precluded because it would drive USWC's overall rate of return for USWC in the aggregate below the minimum necessary to raise capital and would further drive USWC's aggregated overall rate of return below confiscatory levels. Assuming *arguendo*, that such an inquiry is relevant to a Section 208 damages claim, USWC has failed to provide sufficient record evidence for the Commission to assess the impact of any damages award upon its overall interstate rate of return. While USWC has provided some data in Exhibits B and C to its brief,[96] it has made no clear showing of the amount by which an award to MCI would reduce its overall interstate earnings or rate of return let alone that any such reduction would be confiscatory. USWC's other equitable arguments regarding the uncertainty surrounding tariff filings during the 1985-86 period and an alleged windfall to MCI should it receive restitution are equally unavailing. First, USWC had the opportunity to make corrections to its tariff in order to assure that its earnings would not exceed the prescribed rate of return. USWC was not forced by the Commission to overearn during the relevant monitoring period. Second, MCI has shown that it paid unjust and unreasonable rates to the defendants, which entitles MCI to an award of damages to the extent indicated here. The consideration of whether such an award would result in a windfall to MCI has no place in the context of a Section 208 proceeding that, contrary to defendants' repeated assertions, is not governed by equitable principles. MCI has been damaged by defendants excessive earnings and, under legal principles, is entitled to an award of damages.

34. We also reject MCI's claim that the Commission has no jurisdiction to allow defendants to offset damage claims because it would, in effect, be a determination of a carrier's

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> If a shipper proves a rate is unreasonable and that he was damaged in the full amount he was overcharged, the outcome of a § 13(1) [§ 208] proceeding will be no different than that of a § 15(8)(a) [§ 204] proceeding in which the carrier fails to establish the reasonableness of the rate.

[92] In any event, while defendants have asserted that lower charges to MCI would have resulted in lower charges to MCI's customers, they have provided no persuasive evidence in support of this contention. Pacific Bell, for example, relies solely on press clippings that purportedly show that MCI's rates to its customers would have been affected by changes in defendants' rates. These clippings do not, however, establish, as a matter of law, that MCI, in fact, passed on defendants' overcharges to its customers.

[93] 34 FCC 2d 691 (*Hughes*), *recon. denied*, 38 FCC 2d 1052 (1972).

[94] *Id.* at 693.

[95] 245 U.S. at 533.

[96] Exhibit B contains a summary and compilation of information submitted in MTN's, PNB's and NWB's Forms 492 for the relevant monitoring period, a calculation of how much money USWC would have earned if its entire carrier enterprise earned exactly at a 12.75% rate of return, and the same calculation at a 13.10% rate of return. Exhibit C contains a summary and compilation of USWC's over- and underearnings by rate element multiplied by MCI's market share to arrive at the dollar amount by which MCI over- or underpaid for element specific access services. USWC provided calculations at three rate of return levels -- 12.75%, 13.10%, and 13.25%.

rights against a customer. MCI's reliance on *Thornell Barnes* and *Illinois Bell II* for this proposition is misplaced. *Thornell Barnes* involved a carrier's request to "set-off" overcharges billed to a customer for certain calls with purported undercharges on certain other calls. The Review Board disallowed the request because "it would involve a determination of the carrier's rights against a subscriber, over which the Commission has no jurisdiction."[97] Similarly, in *Illinois Bell II*, the Chief, Common Carrier Bureau, *inter alia*, dismissed the cross complaints filed by several Bell Operating Companies (BOCs) against AT&T that asked the Commission to require AT&T, the BOCs' customer with respect to certain shared network facilities, to pay the difference between any unlawful rates and lawful rates as subsequently determined by the Commission. The Bureau ruled that the Communications Act does not provide carriers with a private cause of action against their customers. The Bureau's ruling was upheld by the Commission on reconsideration. In the instant case, we are dealing with an issue fundamentally different from that presented in either *Thornell Barnes* or *Illinois Bell II*. The issue presented by MCI and contested by defendants is the extent to which MCI incurred any actual damages as a consequence of defendants' violations of a binding rate of return prescription. The focus of MCI's complaints is not defendants' individual interstate access rates *per se*, but the excessive earnings produced by these rates and their effect on MCI. We believe that it is reasonable to inquire into MCI's overall purchase of interstate access services from defendants during the period in question for purposes of measuring MCI's damages that are attributable to defendants' violations of the rate of return prescription.

35. MCI's contention that the "filed rate doctrine" prohibits the allowance of offsets is similarly unpersuasive. According to MCI, the filed rate doctrine provides that a common carrier may only charge the rate on file with the Commission that is in effect at a particular time and may not retroactively raise such rate.[98] Therefore, MCI contends, allowing offsets would amount to a retroactive rate increase. Our task in these proceedings, however, is to determine whether MCI suffered any measurable damages that can be attributed to defendants' excessive earnings levels. As a measure of damages, MCI asks only that we compute the difference between what it paid for defendants' interstate access services and what it would have paid if defendants' rates had produced earnings within the Commission's prescribed levels. MCI does not allege that defendants' rates should have been set at a specific amount, nor does it claim that such a showing is necessary for purposes of its damages claims. In this context, where the focus is on earnings levels, not individual rates, we believe it entirely reasonable to examine the sum of MCI's purchases of interstate access services for purposes of assessing its damages claims. The cases that MCI relies upon for its claim do not support a contrary view. None of the cases involved a request for damages based on violations of a rate of return prescription.

36. In addition we reject MCI's claim that the allowance of offsets would somehow repeal our rate of return prescription on a category basis. The issue of damages to a particular complainant is separate and apart from the validity and effect of our rate of return prescription. The determination we make here is the extent to which complainant suffered damage on account of defendants' violations of the rate of return prescription. The question of offsets is relevant to that determination and no other.

37. Pacific Bell does, however, raise factors which it believes warrant an offset against MCI's damages claims. Pacific Bell states that it underearned on its common line services during the period in question and that MCI's prorated share of those underearnings is $1,296,000. In addition, Pacific Bell states that it has previously refunded approximately $498,000 to MCI in 1988 for switched traffic sensitive services overearnings. Pacific Bell argues that taking into account its underearnings and the previously refunded amounts, a net overcharge to MCI of approximately $413,000, based on the measure of damages advocated by MCI, results.[99] Additionally, Pacific Bell argues that it should be allowed to offset any damages awarded here against any undercharges to Telecom*USA, Inc., a subsidiary of MCI that has filed a separate complaint against Pacific Bell.[100]

38. USWC, on the other hand, did not provide any specific calculations or claims for offsets in its brief or reply brief. It has provided, however, as Exhibit C to its brief, a chart listing what it describes as under- and overcharges to MCI and SBS based on earned rates of return of 12.75%, 13.10% and 13.25% for each individual operating company during the relevant monitoring period.[101]

39. We have carefully reviewed the arguments and evidence presented by the parties and believe that some offsets of the claimed damages amounts is appropriate. In the *MCI Liability Order*, we specifically rejected claims by the defendants that the Commission is required to take a carrier's interstate access underearnings as well as overearnings into account in determining whether a violation of the Act has occurred because this would be at odds with established case law.[102] We cannot, however, accept MCI's suggestion that we lack discretion in Section 208 proceedings to consider a complainant's overall purchase of interstate access services from the defendant during a particular monitoring

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[97] 1 FCC 2d at 1275, citing *Laning-Harris Coal & Grain Co. v. St. L. & S.F. R.R. Co.*, 15 ICC 37 (1908).

[98] MCI RBr. at 37, citing *Armour Packing Co. v. United States*, 209 U.S. 56, 81 (1907); *Pennsylvania R. Co. v. International Coal Mining Co.*, 230 U.S. 184, 196-197 (1913); *Lowden v. Simonds-Shield-Lonsdale Grain Co.*, 306 U.S. 516, 520-521 (1939); and *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577-579 (1981).

[99] We note that MCI contends that Pacific Bell should pay damages in the amount of $2,210,851. Pacific Bell contends that the amount in question is approximately $2,207,000 before offsets. There is a difference of $3,851 between these amounts. This difference is due to rounding. MCI used the rate of return rounded to two decimal places (14.51%) as reported in Pacific Bell's Form 492. According to MCI, Pacific Bell calculated the rate of return to the nth decimal resulting in a slightly lower rate of return percentage. MCI RBr. at n.106. We will accept MCI's calculation based on Pacific Bell's reported rate of return.

[100] *See* Telecom*USA, Inc. v. Pacific Bell Telephone Company, File No. E-90-346 (filed May 29, 1990).

[101] USWC states that "MCI and USWC are continuing to work toward development of more precise market share numbers. When appropriate, we will update the numbers on our exhibits." USWC Br. at 19, n.50. No such updates have been provided to the Commission.

[102] *MCI Liability Order*, 5 FCC Rcd at 223, paras. 59-60, citing *Nader v. FCC*, 520 F.2d 182, 201 (D.C. Cir. 1975). *See also New England Telephone and Telegraph Co. v. FCC*, 826 F.2d 1101 (D.C. Cir. 1987), *cert denied*, 490 U.S. 1039 (1989); and *AT&T v. FCC*.

period in assessing the damage or injury to that complainant.[103] We continue to believe, as courts have made clear, that carriers assume the risk of both losses for services they underprice and the prospect of returning amounts realized through rates that are unjustly and unreasonably high.[104] We also maintain our view that a carrier may properly be required to make whole those who have been injured by unlawful rates and practices without regard to whether the carrier has achieved its authorized rate of return overall.[105] Nevertheless, we believe it appropriate for purposes of assessing MCI's damages claims to examine MCI's overall purchase of interstate access services from the respective defendants during the period in question. Significantly, MCI does not dispute that, in its purchase of defendants' interstate access services, it benefitted substantially from defendants' rates that produced underearnings in one or more access categories. Nor does it dispute that defendants, consistent with the Commission's rate of return prescription requirements, could have lawfully effected changes in those rates in order to bring their earnings in line with the authorized level, resulting in higher charges to MCI.[106] Thus, while we view it as a reasonable starting point to look at the difference between the amounts MCI paid for defendants' access services on a category basis and the amount it would have paid if defendants had earned at the prescribed level for the relevant category, we find it also reasonable to offset payments by MCI that contributed to defendants' excessive earnings to the extent that it can be shown that MCI benefitted from defendants' undercharges during the relevant period.

40. We do not agree with MCI's contention that this approach results in unlawful cross-subsidization. Our decision here simply recognizes that although MCI has a legitimate claim for damages as a result of defendants' exceeding the rate of return prescription, it enjoyed offsetting benefits in the form of lower rates as well. We view offsets in the complaint context as appropriate only in relation to a particular complainant's purchase of access services from a defendant carrier. A defendant carrier would not, for example, be able to rely on undercharges to a separate customer or underearnings in general to offset a damage claim based on the measures adopted here. In particular, a complainant that takes service in only one access category that overearned would not have received the benefit of a defendant carrier's underearnings in access categories from which service is not taken.

41. Based upon our decision regarding the computation of damages here, we award damages to MCI from Pacific Bell in the amount of $416,851[107] In reaching this amount, we have accepted MCI's calculation of Pacific Bell's overearnings as $2,210,851 for the switched traffic sensitive category. We have allowed the offset of undercharges in the common line category in the amount of $1,296,000 and the refund of switched traffic sensitive charges for the 1985-1986 monitoring period of $498,000 that was effected by Pacific Bell in 1988. Pacific Bell has made a showing, and MCI has not convinced us otherwise, that MCI recouped a portion of the excessive switched traffic sensitive charges in the form of the rate reduction effected by Pacific Bell in 1988 pursuant to the later-invalidated automatic refund rule. We will not, however, allow an offset of alleged undercharges to Telecom*USA, Inc. We note that at the time the Telecom*USA, Inc. complaint was filed, Telecom*USA, Inc. was not yet a subsidiary of MCI. The transfer of control to MCI was not approved until August 1, 1990.[108] In contrast, MCI's complaint against Pacific Bell was filed on February 9, 1988, nearly two years after the transfer of control of SBS to MCI was approved.[109] Telecom*USA, Inc. has properly filed a separate complaint. Accordingly, offsets, if any, may properly be asserted against Telecom*USA, Inc. in that proceeding and only in that proceeding.

42. We award damages to MCI from Northwestern Bell Telephone Company in the amount of $555,057.[110] In reaching this amount, we have accepted MCI's calculation of NWB's overearnings as $733,811 for the switched traffic sensitive access service category and $192,246 for the spe-

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[103] *See* para. 33, *supra*. We noted in the *MCI Liability Order* that the Constitution does not prohibit the Commission from ordering damages when a carrier has overearned on a service category, citing the prevention of cross-subsidization as a long-recognized objective of rate regulation. *MCI Liability Order*, 5 FCC Rcd at 223, para. 57. We did not, however, preclude defendant carriers from raising circumstances surrounding a customer/complainant's purchase of interstate access, including those in other access service categories, as a defense to damages claims.

[104] *Id.* at 223, para. 58.

[105] *Id.*

[106] *See id.* at 223, para. 59.

[107] As explained in para. 40, this amount is calculated as follows:

$ 2,210,851 (overcharges)

- 1,296,000 (undercharges - common line category)

- 498,000 (refund - switched traffic sensitive category)

$ 416,851 Damages

[108] *See* Telecom*USA, Inc., Memorandum Opinion and Order, 5 FCC Rcd 4857 (Com.Car.Bur. 1990).

[109] *See* Application for Consent to Transfer of Control from IBM to MCI, Order and Authorization, Mimeo 2629 (released Feb. 14, 1986).

[110] As explained in para. 41, this amount is calculated as follows:

$ 733,811 (overcharges - switched traffic sensitive category)

192,246 (overcharges - special access category)

- 227,000 (undercharges to MCI - common line category)

- 21,000 (undercharges to SBS - common line category)

- 64,000 (undercharges to MCI - special access category)

- 2,000 (undercharges to SBS - special access category)

- 49,000 (undercharges to MCI - switched traffic sensitive category)

- 8,000 (undercharges to SBS - switched traffic sensitive category)

$ 555,057 Damages

NWB overearned in the switched traffic sensitive category in Iowa (14.64%), Minnesota (14.33%), Nebraska (15.79%), and North Dakota (19.71%) and underearned in South Dakota (11.76%). NWB overearned in the special access category in Iowa (14.31%), Minnesota (13.85%), Nebraska (13.63%), and North Dakota (16.01%) and underearned in South Dakota

cial access service category. We have reviewed Exhibit C to USWC's brief[111] which sets forth calculations of MCI's and SBS's share of over- and underearnings at three rate of return levels. Based upon our review of the calculations provided by USWC at a 12.75% rate of return, NWB has shown that it is entitled to offset its overearnings in the switched traffic sensitive and special access service categories with MCI's and SBS's share of underearnings in the common line access service category of $248,000, in the special access service category of $66,000, and in the switched access service category of $57,000 for a total offset of $371,000.

43. Consistent with our decision regarding the computation of damages, we will not award damages to MCI from either PNB or MTN. The application of offsets by PNB and MTN to the amounts claimed as damages by MCI reduces those amounts to zero.[112]

2. Interest on Damages Awards

a. Contentions of the Parties

44. Defendants' final claim is that MCI is not entitled to prejudgment interest should the Commission award damages to MCI. Pacific Bell grounds its claim on its contention that the amount of damages has been sharply disputed in these proceedings.[113] Pacific Bell claims that interest would penalize it even though it has not been accused of deliberate wrongdoing and interest is not necessary to make MCI whole. In addition, Pacific Bell argues that, should interest be awarded, it should accrue from the date on which it filed its final Form 492 report as the Commission has held that this is the point at which MCI is chargeable with the discovery of the facts on which its claim is based.[114] USWC!simply contends that while the Commission may award interest under Section 204 of the Act, there is no provision for the award of interest under Section 206 of the Act. Because we cannot lawfully grant MCI a refund, USWC argues, we may not award interest.[115]

45. MCI disputes defendants' claims that it is not entitled to prejudgment interest at the IRS rate in connection with any ultimate damages award. MCI contends that an award of prejudgment interest is appropriate in the instant case because it is explicitly provided for in the parallel refund remedy under Section 204(a)(1) of the Act,[116] and is typically awarded in overcharge cases under the Act in order to make the injured party whole.MCI contends it is entitled to interest at the IRS rate from May 15, 1986 through July 30, 1992 of $1,947,537 from Pacific Bell and $2,046,105 from USWC.[117]

b. Discussion

46. The defendants' claim that the Commission lacks authority to award interest in a Section 208 common carrier complaint proceeding has no merit. Although Section 208 of the Communications Act does not explicitly authorize an award of interest, our authority under Sections 4(i) and other sections of the Act to award interest in a common carrier complaint case is well established.[118] In deciding whether to award interest in a particular common carrier complaint case we are generally guided by federal court practice, where the award of prejudgment interest "... is a matter left to the sound discretion of the trial court."[119] The award of interest in a common carrier complaint case is thus guided by considerations of fairness. Applying this criterion we believe that interest is appropriate in these cases.

47. Pacific Bell's claim that interest would unfairly penalize it even though it has engaged in no deliberate wrongdoing is unpersuasive. As we emphasized in the *MCI Liability Order*, the defendants enjoyed considerable flexibility in formulating the rates that are at issue in these complaints.[120] They were afforded ample opportunity to make mid-course corrections to bring their earnings levels in line with the Commission's prescription thereby avoiding the risks of being ordered to pay damages or refunds or effecting rate increases to remedy earning shortfalls.[121] Under these circumstances, we believe that as a matter of

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(9.21%). NWB underearned in the common line category in Iowa (12.47%), Minnesota (12.40%), Nebraska (12.25%), North Dakota (12.48%), and South Dakota (12.60%).

[111] Exhibit C contains a summary and compilation of USWC's over- and underearnings by rate element multiplied by MCI's market share to arrive at the dollar amount by which MCI over- or underpaid for element specific access services. USWC provided calculations at three rate of return levels -- 12.75%, 13.10%, and 13.25%.

[112] Accepting MCI's calculations for overearnings and USWC's calculations for undercharges at a 12.75% rate of return, these amounts are calculated as follows:

PNB

$ 262,727 (overcharges)

- 346,000 (undercharges to MCI - common line category)

- 51,000 (undercharges to SBS - common line category)

- 175,000 (undercharges to MCI - special access category)

- 5,000 (undercharges to SBS - special access category)

$ 0 Damages

MTN

$ 1,134,175 (overcharges)

- 753,000 (undercharges to MCI - common line category)

- 121,000 (undercharges to SBS - common line category)

- 1,637,000 (undercharges to MCI - special access category)

- 50,000 (undercharges to SBS - special access category)

$ 0 Damages

[113] *See, e.g.*, Pacific Bell Br. at 19.

[114] *Id.* at 20, citing to *MCI Liability Order*, 5 FCC Rcd at 225, para. 78.

[115] USWC Br. at 12-13.

[116] *See* 47 U.S.C. § 204(a)(1). MCI RBr. at 45.

[117] MCI RBr. at Appendix D.

[118] *See* MCI Telecommunications Corporation v. American Telephone and Telegraph Company, *et al.*, 94 FCC 2d 332, 343-46 (1983).

[119] *United States v. California Board of Equalization*, 650 F.2d 1127, 1132 (9th Cir. 1981), *aff'd*, 456 U.S. 901 (1982), *reh'g denied*, 456 U.S. 985 (1982).

[120] 5 FCC Rcd at 223. *See, infra*, para. 29.

[121] *Id.*

fundamental fairness, interest awards are appropriate irrespective of the motive or intent behind defendants' actions in exceeding the prescribed earnings level. Nor do we find merit in Pacific Bell's claim that interest is inappropriate because the amount of damages has been uncertain and sharply disputed. Defendants' earning levels were readily ascertainable at the time the complaints were filed, as was the extent to which those earnings exceeded the Commission's prescribed level. We are satisfied that MCI's complaints, which cite to defendants' excessive earnings as the basis for its damages claims, provided reasonable certainty of the amount of the damages it seeks.

48. We are left then with the question whether an award of interest in these proceedings is necessary to make MCI whole. We conclude that it is. MCI argues convincingly that it has been effectively deprived of the use of the excessive amounts it paid defendants as a result of defendants' unlawful rates while defendants, on the other hand, have enjoyed the beneficial use for a substantial period of time of funds to which MCI rightfully has claim. We are persuaded that interest is required not only to effect a full and fair remedy for MCI, which paid rates higher than it would have paid had defendants' earned within the prescribed levels, but also to avoid any unjust enrichment of defendants stemming from their charging rates that we have determined to be unjust and unreasonable under Section 201(b) of the Act.[122] We find, therefore, that MCI's request for interest computed at the IRS rate for tax refunds is reasonable and appropriate and direct that such interest be computed on the damages awarded MCI in these proceedings from January 1, 1987, the day after which the 1985-1986 monitoring period ended,[123] until the date of full payment to MCI.[124]

IV. CONCLUSION

49. We have carefully reviewed the extensive record before us and have found, to the extent indicated here, that complainant is entitled to an award of damages, plus accumulated interest on such damages amount, for Pacific Bell Telephone Company's and Northwestern Bell Telephone Company's violations of our rate of return prescription for the 1985-1986 monitoring period.

V. ORDERING CLAUSES

50. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201, 206, 207, 208, and 209 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201, 206, 207, 208, and 209, that Pacific Bell Telephone Company SHALL PAY to MCI Telecommunications Corporation the sum of $416,851 (Four hundred sixteen thousand eight hundred fifty-one dollars) within 60 days after release of this Memorandum Opinion and Order; and that Northwestern Bell Telephone Company SHALL PAY to MCI Telecommunications Corporation the sum of $555,057 (Five hundred fifty-five thousand fifty-seven dollars) within 60 days after release of this Memorandum Opinion and Order.

51. IT IS FURTHER ORDERED that Pacific Bell Telephone Company and Northwestern Bell Telephone Company SHALL PAY to MCI Telecommunications Corporation interest on the damages awarded here at the IRS rates set forth in Appendix A from January 1, 1987 until the date full payment is made.

52. IT IS FURTHER ORDERED that the Motions for Leave to File Out of Time filed by MCI on July 6, 1992 and July 14, 1992 ARE GRANTED.

53. IT IS FURTHER ORDERED that the Supplement to Motion to Dismiss filed by USWC on February 14, 1992 IS ACCEPTED for filing.

54. IT IS FURTHER ORDERED that the Application for Review filed by USWC on June 9, 1992 IS DENIED.

55. IT IS FURTHER ORDERED that the Motion for Summary Judgment filed by Pacific Bell on January 17, 1992, the Joint Motion to Dismiss filed by USWC on March 31, 1988, the Joint Supplemental Motion to Dismiss Complaint for Damages filed by USWC on April 11, 1990, the Motion to Dismiss filed by Pacific Bell on April 5, 1988, and the Motion to Dismiss Supplemental Complaint filed by Pacific Bell on April 25, 1990, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[122] *See* New England Telephone and Telegraph Co. v. FCC, 826 F.2d 1101, 1113 (D.C. Cir. 1987), *cert. denied*, 109 S. Ct. 1942 (1989) (carriers may reasonably be required "to pay full interest for earnings they had no right to retain in the first place.").

[123] At that point, defendants were subject to the earnings limitations of a distinct monitoring period.

[124] The applicable IRS rates are set forth in Appendix A. We believe that the rationale adopted by the Commission for applying the IRS rate in pole attachment complaint proceedings under Section 224 of the Act, 47 U.S.C. § 224, is equally applicable here. In Teleprompter of Fairmont v. C&P of West Virginia, 79 FCC 2d 232 (1980), the Commission stated

> As a matter of fairness, we believe that the rate of interest applied in a pole attachment complaint proceeding should be readily available, easily applied, and periodically revised to reflect changes in borrowing costs. In light of these considerations, we find the interest rate for federal tax refunds and additional tax payments suitable for use in this type of proceeding. This rate appears in a variety of easily obtained official and commercial publications, and is revised on a regular basis. [Footnote omitted.]

79 FCC 2d at 238.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

COMMUNICATIONS SATELLITE CORPORATION

Petition for Declaratory Ruling or, in the Alternative, for Partial Waiver of Structural Separation Requirements — File No. I-S-P-92-001

Request for a Waiver of Structural Separation Allowing COMSAT's World Systems Division to Provide Sales, Engineering, Billing, and Administrative Support to a Corporate Affiliate for the Resale of Cellular Communications Service to Ships — File No. I-S-P-91-004

MEMORANDUM OPINION AND ORDER

Adopted: February 5, 1993 **Released: March 2, 1993**

By the Commission: Commissioner Barrett concurring and issuing a statement; Commissioner Duggan issuing a statement.

I. INTRODUCTION

1. The Communications Satellite Corporation (COMSAT) requests a declaratory ruling stating that the Commission's existing structural separation requirements permit COMSAT Mobile Communications (CMC), a corporate division of COMSAT, to provide certain value-added maritime services specified by COMSAT in its petition on an unseparated basis, subject to existing accounting safeguards.[1] In the alternative, COMSAT asks the Commission to grant a partial waiver of its structural separation requirements to enable CMC to provide these services on an unseparated basis, subject to existing accounting safeguards. (File No. I-S-P-92-001)

2. We find that there is no basis in the *COMSAT Structure* orders for granting the declaratory ruling requested by COMSAT. However, we grant COMSAT a waiver of our structural separation requirements to permit it to offer certain value-added maritime services on an unseparated basis, subject to COMSAT's compliance with the nonstructural safeguards specified in this order.[2]

II. BACKGROUND

3. In the early 1980s, the Commission undertook studies of COMSAT's structure to determine whether it could offer services outside its statutory (jurisdictional) obligations.[3] The Commission concluded that COMSAT could offer competitive, nonjurisdictional services that were not inconsistent with itsstatutory mission.[4] However, the Commission recognized a number of public policy concerns that would arise if COMSAT were to begin offering such competitive services. These problems included conflicts of interest resulting from COMSAT's involvement in both jurisdictional and nonjurisdictional activities, competitive advantages in nonjurisdictional markets flowing from COMSAT's unique status as the U.S. Signatory to INTELSAT and INMARSAT, and potential cross-subsidization which could harm its ratepayers as a result of the misallocation of jurisdictional and nonjurisdictional costs.

4. To meet these concerns, the Commission determined that COMSAT should be separated into two distinct corporate elements. One element was to handle all nonjurisdictional, *i.e.*, non-INTELSAT/INMARSAT activities, and the other element was to handle its jurisdictional activities. In addition, COMSAT was to abide by certain prescribed accounting procedures, coupled with structural separation and arms-length dealings between the separate elements. The Commission did permit COMSAT to retain a very limited number of joint activities within the jurisdictional company subject to accounting safeguards.[5]

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[1] Also before us is an earlier petition filed by COMSAT for a limited waiver of its structural separation requirements to allow it to offer cellular maritime resale services through a hybrid of separated and unseparated entities. (File No. I-S-P-91-004). Specifically, COMSAT seeks this waiver to allow its unseparated jurisdictional division, formerly the World Systems Division, now CMC, to provide, under contract, all administrative, engineering and support services pertaining to the provision of cellular maritime resale services to a nonjurisdictional separate subsidiary, COMSAT Mobile Investments, Inc. (CMI). CMI, in turn, would provide the cellular maritime resale services to the customer, relying only on existing accounting safeguards to prevent anticompetitive conduct. Because the issues in File No. I-S-P-91-004 are subsumed by the broader proceeding in File No. I-S-P-92-001, we dismiss File No. I-S-P-91-004.

[2] COMSAT was granted special temporary authority on March 26, 1991, to offer cellular maritime resale services in the Caribbean region through CMI, pending action on its waiver request. (File No. TAO-1806). Four modifications to the STA were granted to permit CMI to offer these services, on a very limited basis, outside the Caribbean region. (File Nos. TAO-2017 (modified in TAO-2127), TAO-TAO-2126, and TAO-2036 and TAO-2060 (modified in TAO-2157, 2158)).

[3] *See* COMSAT Study Order, 77 FCC 2d 564 (1980); Changes in the Corporate Structure and Operations of COMSAT, *Memorandum Opinion and Order*, 90 FCC 2d 1159 (1982); *recon. den.*, 93 FCC 2d 701 (1983); *Second Memorandum Opinion and Order*, 97 FCC 2d 145 (1984); *recon. den. in part*, 99 FCC 2d 1040 (1984).

[4] COMSAT was created as the U.S. Signatory to the International Telecommunications Satellite Organization (INTELSAT) by the Communications Satellite Act of 1962, as amended, 47 U.S.C. Sections 701, *et. seq.* In 1978, Congress amended that act to provide for COMSAT's participation in the International Maritime Satellite Organization (INMARSAT).

[5] COMSAT was able to maintain a single Headquarters for both its jurisdictional and nonjurisdictional operations, and to retain its COMSAT Laboratory within its jurisdictional World Systems Division, even though the laboratory performed research for both corporate elements.

III. DISCUSSION

A. Petition for Declaratory Ruling

5. The petition for declaratory ruling or, in the alternative, for waiver was filed by COMSAT on November 27, 1991. In response, ten comments and six replies were received by the Commission.[6] Pan American Satellite (PAS) filed the only opposition to the petition.

6. COMSAT asks that the Commission issue a declaratory ruling that the *COMSAT Structure* orders permit CMC, a jurisdictional division,[7] to provide certain nonjurisdictional value-added services to its maritime customers as incidental or ancillary to its provision of jurisdictional maritime satellite communications services via INMARSAT. COMSAT describes these value-added services as including maritime enhanced services, development of communications software, maritime communications services (other than satellite) provided on a resale basis, and resale or lease of related shipboard equipment.[8] COMSAT contends that CMC, rather than a separated subsidiary, should provide these services, as long as CMC abides by the existing accounting and cost allocation procedures set out in the *COMSAT Structure* orders. COMSAT argues that while "value-added" services were not specifically addressed in the *COMSAT Structure* orders, it nonetheless maintains that the orders can be interpreted to permit an unseparated subsidiary of COMSAT to offer value-added services because they are "integrally related to COMSAT's INMARSAT maritime services. . ."[9]

7. COMSAT also cites a prior Commission decision in which COMSAT's jurisdictional division was permitted to provide aeronautical INMARSAT space segment and ground segment unseparated from maritime INMARSAT space segment and ground segment, although subject to cost separation and allocation procedures. [10] COMSAT asserts that the same cost separation and allocation procedures utilized by CMC for the provision of aeronautical and maritime INMARSAT services should be applied in connection with these value-added services.

8. In response, PAS maintains that COMSAT's privileged position as the U.S. Signatory to INTELSAT/INMARSAT is incompatible with a grant of its request for a declaratory ruling.[11] Furthermore, PAS argues that the *COMSAT Structure* orders do not provide the legal framework for COMSAT to offer value-added services via a jurisdictional entity, rather than through a nonjurisdictional separate subsidiary. According to PAS, in the *COMSAT Structure* orders, the Commission considered and rejected the argument that COMSAT should be permitted to offer nonjurisdictional services without structural separation.

9. We agree with PAS that there is no indication in the *COMSAT Structure* orders that COMSAT is authorized to offer competitive, nonjurisdictional services in a manner other than through a separate subsidiary. Nor did the Commission change this policy for aeronautical INMARSAT services in the *Aeronautical Order*. In that Order, the Commission did not require aeronautical INMARSAT services to be separated from maritime INMARSAT services because both services are jurisdictional. Maritime services are specifically included in the Satellite Act, 47 U.S.C. Section 501, *et. seq.*, as services to be provided by COMSAT and aeronautical services were found by the Commission to be ancillary to maritime services and thus also jurisdictional. *Aeronautical Order, supra*. COMSAT makes no argument here that value-added services are jurisdictional. Moreover, as COMSAT concedes, value-added services were not even addressed by the Commission in the *COMSAT Structure* orders.[12] One of the Commission's chief concerns was how to permit COMSAT to offer competitive nonjurisdictional services while protecting customers and competitors from potential anticompetitive behavior by COMSAT. The Commission concluded that structural separation was the means to achieve this goal. COMSAT's argument that the *COMSAT Structure* orders already permit the offering of competitive services on an unseparated basis is not supported by a reading of these orders. Therefore, we deny COMSAT's petition for a declaratory ruling.

B. Petition for Waiver

10. COMSAT alternatively argues that, if the Commission denies the petition for declaratory ruling, the Commission should grant a partial waiver of structural separation requirements imposed on COMSAT to allow CMC to provide certain value-added maritime services on an unseparated basis, subject only to existing accounting and cost allocation safeguards. According to COMSAT, these value-added services fall into four general categories: (1) enhanced services using, or accessed via, COMSAT's maritime satellite services, such as the SeaMail and Global Positioning System (GPS) services; (2) development of personal computer communications software designed to enable maritime users to meet operational needs and make more efficient use of COMSAT's maritime satellite communications services; (3) supplemental non-INMARSAT maritime communications services provided on a resale basis, such as the resale of maritime cellular communications services to ship operators that require integrated sat-

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[6] The parties are Atlantic Tele-Network, Inc. (ATN), International Space Brokers, Inc. (Space Brokers), IDB Communications Group, Inc. (IDB), Kloster Cruise Limited, Comdata Consumer Services, Mobile Telesystems, Inc., Cruisephone, Inc. (Cruisephone), Marine Management Systems, Inc., ComGrafix, Inc., Magnavox Electronics Systems Company, and Oceantrawl. Reply comments were filed by the Department of the Navy, Golden Alaska Seafoods, Inc., Arctic Alaska Fisheries Corporation, the Department of Defense, American Seafoods Company and Cunard Line Ltd. All the comments consist of very brief letters of support for COMSAT's petition. PAS also filed an emergency request to hold this proceeding in abeyance. *See* paras. 13-14; 34-36, *infra*.

[7] According to COMSAT, CMC is the COMSAT division that provides maritime, aeronautical, and international land mobile satellite communications services via the INMARSAT system.

[8] COMSAT Petition at 2.

[9] COMSAT Petition at 15-16.

[10] Provision of Aeronautical Services via the INMARSAT System, *Report and Order*, 4 FCC Rcd 6072 (1989) (*Aeronautical Order*).

[11] Moreover, PAS contends that the relief requested by COMSAT should be considered in a rulemaking proceeding because its request is of a general nature with broad applicability. PAS has since filed a petition to reopen the *COMSAT Structure* proceeding. *See* PAS Petition to Reopen Proceeding, CC Docket No. 80-634, filed May 12, 1992.

[12] COMSAT Petition at 15.

ellite and cellular services;[13] and (4) the resale and/or installation of shipboard equipment and programming used in conjunction with COMSAT's maritime communications services.[14]

11. COMSAT argues that the international maritime services market has become increasingly competitive as a number of foreign signatories have introduced new services in an attempt to expand customer access.[15] COMSAT contends that its primary competitors are these INMARSAT signatories, which are not bound by the same regulatory constraints as COMSAT. In particular, COMSAT asserts that foreign signatories are able to offer integrated packages of communications and information services that COMSAT is currently prevented from offering under the structural separation requirements.[16]

12. COMSAT further argues that structural separation, through a separate subsidiary, is economically inefficient because it requires the duplication of existing personnel and facilities.[17] COMSAT maintains that it would be very costly to establish such a subsidiary and that the time and resources spent on creating this separate subsidiary could be better used to provide new value-added services through its jurisdictional element.

13. PAS's initial objection is based on procedural grounds. It maintains that COMSAT's petition involves a request to formulate policy of a general nature because it involves a broad array of maritime communications services and products, and should therefore be determined by a rulemaking proceeding. In response, COMSAT states that its petition does not raise general policy issues having broad applicability and a rulemaking is not warranted. COMSAT claims that administrative agencies have broad discretion whether to decide matters in a rulemaking or waiver proceeding.[18]

14. We find that a rulemaking is not required in this context. The relief requested by COMSAT concerns a discrete class of maritime value-added services. The services at issue are limited, and the narrow relief requested is more appropriately addressed in the context of a waiver rather than a broader rulemaking proceeding. The Commission has the discretion to determine the means by which COMSAT is permitted to offer these services, and we find it would not serve the public interest to initiate a rulemaking solely to deal with this discrete category of maritime value-added services. As PAS notes, the broader issue of what regulatory structure should be applied to COMSAT's provision of all its jurisdictional and non-jurisdictional or competitive services is raised in PAS' petition to reopen the *COMSAT Structure* proceeding.[19]

15. PAS further contends that COMSAT should not be granted a waiver of its structural separation requirements in order to provide maritime value-added services. According to PAS, there is an inherent conflict of interest between COMSAT's dual roles as the sole U.S. INTELSAT/INMARSAT signatory and as a provider of competitive international telecommunications services. PAS states that the Commission addressed this conflict in the COMSAT Structure orders and determined that structural separation is the best means of limiting COMSAT's ability to gain undue advantages over its U.S. competitors and of preventing COMSAT from engaging in cross-subsidization through misallocation of costs.[20]

16. Moreover, PAS maintains that COMSAT has not provided the required "concrete support" for its waiver, characterizing COMSAT's arguments as "speculative and conclusory".[21] For example, PAS argues that COMSAT fails to provide a detailed explanation of why the creation of a separate subsidiary to offer its enumerated maritime related value-added services would be economically inefficient.

17. In granting a waiver, the Commission must clearly articulate a standard by which the public can determine the policy underlying the grant.[22] The standard we apply in reviewing a waiver request is whether the petitioner can demonstrate that application of a Commission rule or policy in its particular circumstances would not be in the public interest.[23] The particular circumstances must be so

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[13] As previously noted, COMSAT is currently providing these cellular maritime services on a limited basis pursuant to an STA. *See supra* n.2.

[14] COMSAT includes in the fourth category such items as shipboard terminals, personal computers, facsimile machines and related equipment associated with its cruise ship business communications centers; video codecs and programming for COMSAT's compressed video service; other peripheral communicationsh) equipment, and equipment needed for COMSAT's integrated maritime satellite/cellular services. We understand that COMSAT does not manufacture any of this equipment, but purchases this equipment for resale or lease to its customers. COMSAT Petition at 11-12.

We note that the issue of whether or not COMSAT will provide on an unseparated basis video codecs type equipment and programming was initially raised by COMSAT in its application in File No. I-T-C-92-075. The application was placed on public notice on January 8, 1992, and no oppositions were filed. The International Facilities Division granted the application as to basic video service only and referred the issues of video equipment and programming to this proceeding. COMSAT, *Memorandum, Opinion and Order*, 7 FCC Rcd 6242 (1992). We find that video equipment and programming should be treated in the same manner as the other types of value-added services that COMSAT has described in its Petition.

[15] For example, COMSAT states that in 1982, there were just three other INMARSAT Signatories operating a total of four INMARSAT land earth stations in the three INMARSAT ocean coverage areas. Now, there are 35 land earth stations operated by 22 service providers offering INMARSAT service in four INMARSAT Ocean coverage areas. COMSAT Petition at 6.

[16] COMSAT Petition at 8.

[17] *First Reconsideration Order*, 93 FCC 2d at 714.

[18] COMSAT cites *South Central Bell Telephone Company v. Louisiana Public Service Commission*, 744 F2d 1107, 1118 (5th Cir. 1984), *SEC v. Chenery Corp.*, 322 U.S. 194 (1947). Furthermore, COMSAT contends that Section 4(j) of the Communications Act gives the Commission broad authority to conduct its proceedings "in such manner as will best conduce to the proper dispatch of business and to the ends of justice." Section 154(j) of the Communications Act; *see also, FCC v. Schreiber*, 381 U.A. 279, 289-90 (1965).

[19] *See supra* n.11.

[20] PAS Petition at 3-4.

[21] PAS Petition at 6.

[22] *Northeast Cellular L.P. v. FCC*, 897 F.2d 1164, 1166; *Florida Cellular Mobil Communications Corporation*, 6 FCC Rcd 6910 (1991).

[23] *WAIT Radio* 418 F.2d 1153, 1157 (D.C. Cir. 1969). *See also* 47 C.F.R. § 1.3.

special and unique as to warrant deviation from the standard rule.[24] Furthermore, the Commission must determine whether grant of the waiver would undermine the policies the rule was designed to further and whether the waiver would promote any significant Commission policies.[25]

18. Based on the record in this proceeding, we find that a waiver is justified to enable COMSAT to offer certain value-added services on an unseparated basis. The *COMSAT Structure* orders adopted structural separation between COMSAT's jurisdictional and nonjurisdictional activities because COMSAT was -- and remains -- the sole U.S. Signatory to INTELSAT/INMARSAT. COMSAT has justified a waiver of this general rule by demonstrating that application of the rule in the particular circumstances of the value-added maritime services described in COMSAT's petition would not be in the public interest.

19. COMSAT demonstrates that it faces direct and immediate competition from Cruisephone and other providers of these value-added maritime services, including the non-U.S. INMARSAT Signatories. However, unlike its competitors, COMSAT is subject to regulatory restraints, such as structural separation, due to its position as U.S. Signatory to INTELSAT/INMARSAT. In the context of the services at issue in the waiver request, we believe COMSAT has demonstrated that the costs of structural separation are high, not only in terms of duplicative costs, but also in additional lead time required to offer new value-added(services.[26] Specifically, COMSAT has shown that it would not be cost effective for it to establish a separate subsidiary for maritime related value-added services, given the limited extent of these services and their close relationship to COMSAT's jurisdictional maritime satellite services. COMSAT explains that because its customers are located throughout the world, it would be necessary for it to establish two offices worldwide, with the attendant staff and equipment, to comply with structural separation requirements. This would result, according to COMSAT, in significant loss of lead time in initiating new services, the loss of savings from common use of facilities, and the need to reestablish relationships with customers.[27] We accordingly agree with COMSAT that requiring it to establish a separate subsidiary for the limited value-added maritime services at issue in this waiver request could have a "stifling effect on efficiency, innovation, service availability, and competitiveness" and hamper COMSAT's ability to compete effectively in this market, where its competitors are not subject to such separation requirements.[28]

20. Conversely, we find that grant of the waiver to allow COMSAT to enter the maritime value-added services market without the requirement to form a separate subsidiary would serve the public interest by enabling COMSAT to offer new value-added service to its maritime customers with less delay, more customer convenience and lower prices. Moreover, we find that grant of the waiver subject to the conditions described below would not undermine the purpose of the structural separation rules, which is to prevent COMSAT's nonjurisdictional activities from gaining an unfair competitive advantage through discrimination in its favor or from receiving subsidies from its jurisdictional INMARSAT (and INTELSAT) operations. We believe that imposing the regulatory safeguards detailed below in lieu of structural separation should be sufficient to prevent, or minimize, any unfair competitive advantages associated with COMSAT's provision of these maritime value-added services on an unseparated basis.

21. Accordingly, we find that grant of the waiver to permit COMSAT to provide the enumerated value-added services through its CMC division is in the public interest. However, as discussed below, this grant is conditioned upon COMSAT submitting, and the Commission approving, nonstructural safeguards that provide adequate protection against potential anticompetitive behavior by COMSAT.[29]

C. Nonstructural Safeguards

22. COMSAT acknowledges the need for nonstructural safeguards to provide value-added maritime services on an unseparated basis.[30] At the same time, COMSAT also argues that the existing *COMSAT Structure* orders already provide "a comprehensive package of nonstructural requirements designed to deter cross-subsidization, anticompetitive conduct, conflicts of interest, and other anticipated potential harms."[31] These regulatory restrictions, however, were designed to complement structural separation, not to permit the provision of value-added services on an unseparated basis. Thus, these restrictions do not address in detail the full range of requirements for proper accounting and cost allocation, including audit standards. Neither do these restrictions address other nonstructural safeguards, such as prevention of discrimination or adequate disclosure of network information. For these reasons, we disagree with COMSAT's position that the accounting and cost allocation principles established by the *COMSAT Structure* orders are sufficient to prevent cross-subsidization in the provision of value-added services on an unseparated basis. We find that a partial waiver of COMSAT's structural separation requirements must be accompanied by the establishment of certain nonstructural safeguards which will ensure that service providers and customers are protected from the potential abuse of COMSAT's monopoly power. Thus, before COMSAT is permitted to engage in any of the unseparated operations requested in its waiver petition, COMSAT must file, and the Commission must approve, conditions implementing appropriate nonstructural safeguards.[32]

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[24] *See, Northeast Cellular L.P. v. FCC, supra.*

[25] *Lauren A. Colby, Esq.*, 4 FCC Rcd 4461 (1989); *Northeast Cellular L.P. v. FCC, supra.*

[26] COMSAT Petition at 22-4.

[27] *Id.* at 23-4.

[28] COMSAT Reply at iii. COMSAT requested a waiver only for value-added maritime services as described in paragraph 10, *supra*, and the record specifically focuses on the market for these services. We emphasize that the waiver granted is strictly limited to such value-added maritime services and does not apply to any other ancillary Inmarsat services.

[29] COMSAT will be allowed to continue providing limited maritime cellular service on a resale basis under its existing STAs during our review. *See supra* note 2.

[30] COMSAT Petition at 21.

[31] COMSAT Reply at 11-12.

[32] We delegate authority to the Common Carrier Bureau to approve or disapprove COMSAT's nonstructural safeguard submission and subsequent revisions based on the results of its analysis and consideration of public comments received after

23. We believe that the *Computer III Remand* order[33] contains certain regulatory safeguards that serve as a useful starting point for the development of the conditions required by this waiver order."[34] In the *Computer III Remand* order, the Commission determined that "a set of nonstructural safeguards will effectively protect against potential discrimination by the BOCs in the provision of basic services to competitive enhanced service providers."[35] As the sole U.S. provider of INMARSAT satellite (space segment) service, COMSAT's position with respect to competing value-added service providers is similar to that of the BOCs, in that the provision of satellite service is open to potential discrimination. For this reason, the nonstructural safeguard submission we require of COMSAT is based on the nonstructural safeguard rules contained in the *Computer III* proceeding, adapted to apply to COMSAT's provision of satellite service. In particular, COMSAT's plan must specify nonstructural safeguards adequate to ensure nondiscrimination in the provision of satellite service, disclosure of satellite network information, and use of customer proprietary network information (CPNI). COMSAT's submission must also describe the accounting and cost allocation procedures COMSAT will implement to protect against cross-subsidization.

24. We recognize that there are considerable differences between the satellite and local exchange markets, and for this reason we intend to be flexible in reviewing and approving COMSAT's nonstructural safeguard submission. If COMSAT can demonstrate, for instance, that certain requirements applicable to the BOCs are inappropriate for COMSAT, and are not necessary to prevent COMSAT from abusing its market position in the maritime market, the Common Carrier Bureau may consider altering or even eliminating a particular safeguard as a condition of the grant of this waiver. Moreover, COMSAT is free to propose alternative safeguards in its submission that are equally effective in preventing anticompetitive conduct as those discussed below, yet are perhaps less burdensome or more appropriately tailored to COMSAT's unique position in this market.[36]

25. *Provision of INMARSAT Satellite Service.* Because COMSAT's value-added service competitors, in many instances, rely on COMSAT for timely provision of underlying maritime satellite service, COMSAT's nonstructural safeguard submission must include a detailed description of the specific procedures COMSAT will use to ensure nondiscrimination in its provision of maritime satellite service. This description should include the means to ensure nondiscriminatory availability, as well as quality, of service. Thus, the submission must include a description of its processing procedures for channel assignment and monitoring, of the personnel who are involved in administering those procedures, and of the various types of records that are maintained in this process.

26. *Network Disclosure Requirements.* COMSAT's value-added service competitors require timely access to technical information related to new or modified satellite service specifications affecting their value-added service offerings in order to compete effectively. We therefore require COMSAT to publicly disclose all relevant satellite network information in a timely manner. We note that certain existing procedures, such as COMSAT's U.S. Customer and Manufacturer Industry Advisory Group (IAG) briefings, may already provide the public with a certain degree of satellite network information.[37] However, the detail of information provided and the timing of disclosure have not been addressed by COMSAT. COMSAT's submission must therefore provide, in detail, the type of network information that will be revealed to the public, as well as the timing of disclosure, and conversely the type of information, if any, which will be withheld from the public.

27. *Customer Proprietary Network Information (CPNI).* COMSAT is in the unique position of having access to the CPNI of subscribers to its satellite service. This information can provide COMSAT with a significant competitive advantage over competing value-added maritime service providers.[38] For this reason, we require COMSAT's submission to describe procedures to ensure that COMSAT does not gain an unfair marketing advantage from preferential access to the CPNI of its satellite customers. In *Computer III*, the discussion of CPNI focused on the issues of competitive equity, efficiency and consumer privacy, in determining whether prior written authorization would be required. COMSAT's CPNI submission should also consider these issues.[39]

28. COMSAT should propose a way of limiting access by its value-added service personnel to a jurisdictional customer's CPNI if the customer declines to authorize such access by prior written authorization or by other means. COMSAT's submission must also ensure that this proprietary information is available to competing service providers on the same terms and conditions that COMSAT makes CPNI available to its own value-added service operations, consistent with customer authorizations. In addition, the submission must include a full description of the type of information COMSAT will treat as CPNI and the means COMSAT will use to inform its subscribers of their rights to restrict access to their CPNI.

29. *Accounting Safeguards and Cost Allocation Procedures.* Approval of the waiver is further conditioned on COMSAT developing effective accounting safeguards and cost alloca-

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the Bureau issues a Public Notice soliciting such comments. In addition, the Public Notice will be published in the Federal Register.

[33] Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, 6 FCC Rcd 7571 (1991) (*Computer III Remand* order), recon. pending, and petition for review pending, *California v. FCC*, No. 92-70083 (and consolidated cases) (9th Cir., filed Feb. 14, 1992).

[34] COMSAT argues that "[t]he rationale of [the *Computer III*] rulings clearly applies to COMSAT Mobile Communications' provision of value-added services." Petition at 3.

[35] *Computer III Remand* order, 6 FCC Rcd at 7597-98.

[36] We note that commenting parties may also propose alternative safeguards that meet these criteria.

[37] COMSAT Reply at 14.

[38] See *Computer III Remand* order, 6 FCC Rcd at 7606-07 (discussion of the competitive advantages of CPNI).

[39] To the extent that COMSAT's customers are large and sophisticated in the same sense as the twenty-line customers described in *Computer III*, prior written authorization may be appropriate. As is the case for the largest business customers of the BOCs, obtaining prior authorization may not be especially difficult or burdensome for COMSAT because in most cases COMSAT already has established relationships with its maritime customers. *See Computer III Remand* order, 6 FCC Rcd at 7611.

tion procedures to assure that its nonjurisdictional value-added maritime service activities are not subsidized by jurisdictional activities. In its Reply, COMSAT maintains that its existing accounting and cost allocation systems are adequate, but, nevertheless, has no objection to the imposition of additional requirements should the Commission find them necessary.[40] We find that COMSAT's existing accounting and cost allocation systems are not adequate and therefore we find that COMSAT's submission must include the following modifications.

30. To assure that CMC separates its costs for jurisdictional and nonjurisdictional maritime activities, CMC's accounting system must separate its wholly jurisdictional assets, expenses, and revenues from its wholly nonjurisdictional assets, expenses, and revenues used in the provision of maritime value-added services. The system should also be capable of separately identifying and maintaining an audit trail for any expenses incurred, and for joint or common assets and resources used, in the provision of both jurisdictional and nonjurisdictional maritime services.[41] Joint and common costs are to be allocated on a fully distributed and cost causative basis between, or directly to, the jurisdictional and nonjurisdictional elements within CMC following the standards contained in Sections 64.901 (a) and 64.901 (b)(1)-(3) of the Commission's rules. In addition, the price of any product or service provided by the nonjurisdictional maritime value-added service activity to the jurisdictional activity shall not be in excess of fully distributed cost to the nonjurisdictional activity.

31. For the purpose of making the required cost assignments and allocations, COMSAT's submission shall include a cost allocation manual (CAM) which shall be updated when any changes in cost allocation procedures are expected to be implemented by CMC. The CAM filing and subsequent updates shall be made available for public comment and shall be reviewed by the Common Carrier Bureau. The STAs shall remain in effect until approval of the CAM is finalized.

32. We intend to monitor the implementation of the CMC CAM, the results of cost allocations, and the growth of value-added maritime nonjurisdictional activities sharing costs with jurisdictional services. Therefore, we delegate to the Common Carrier Bureau the authority to request data necessary to monitor COMSAT's provision of these nonjurisdictional value-added maritime services without structural separation. We also expect CMC to maintain a complete audit trail for all cost allocations. Further, CMC shall file an annual Joint Cost Report showing, on an account-by-account basis, its revenues, expenses, and assets in total, as directly assigned to jurisdictional and nonjurisdictional maritime value-added service activities, as attributed to jurisdictional and nonjurisdictional maritime value-added service activities, as generally allocated to jurisdictional and nonjurisdictional maritime value-added service activities, and in total for jurisdictional and nonjurisdictional maritime value-added service activities. COMSAT shall also have an audit performed annually by an independent auditor. The audit must provide a positive opinion on whether the data shown in the annual Joint Cost Report presents fairly, in all material respects, the information required to be set forth in accordance with the CMC CAM that is in force as of the date of the auditor's report. The audit shall be conducted in accordance with generally accepted auditing standards, except as otherwise directed by the Chief, Common Carrier Bureau. The Joint Cost Report and the report of the independent auditor shall be filed with the Chief, Accounting and Audits Division, on April 1 of each year, covering the previous calendar year. The Common Carrier Bureau is delegated authority to prescribe the format for the Joint Cost Report.

33. Finally, we emphasize that, under the *COMSAT Structure* orders and our ruling here, COMSAT is not permitted to bundle any maritime value-added services that are the subject of this waiver with its tariffed jurisdictional services. Unless COMSAT offers mobile terminal equipment, related software and other nonjurisdictional maritime value-added services unbundled and priced separately from the tariffed satellite service, customers would not be able to choose their own equipment and software independent of the satellite service, in a combination that best meets their individual needs. Without unbundling, a customer might be forced to buy unwanted COMSAT-supplied nonjurisdictional maritime value-added services in order to obtain necessary jurisdictional services.[42] In order to enforce this requirement, as part of its submission COMSAT must certify that it will comply with this unbundling requirement as a condition of the grant of this waiver.

D. PAS Emergency Request to Hold Proceeding in Abeyance

34. On January 21, 1993, PAS filed an emergency request to hold this proceeding in abeyance. PAS offers two reasons why it believes that it would be contrary to the public interest to act on COMSAT's petition at this time. First, it refers to two formal complaints filed by IDB Aero-Nautical Communications, Inc. (IDB) against COMSAT.[43] PAS believes that, if IDB's allegations of improper sales practices are proven true, they should be remedied by

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[40] For example, COMSAT expressed its willingness to submit CMC to annual audits by independent auditors to confirm that it has fairly applied the Commission's cost allocation procedures and to furnish a list, to be updated quarterly, of all nonjurisdictional activities of CMC and all task codes employed in CMC's accounting system. COMSAT Reply at 15, n.25.

[41] From our review of material submitted by COMSAT during the course of this proceeding, the current system is already designed to separate its expenses through a two-digit "Cost Company" code which may be used for separating jurisdictional from nonjurisdictional costs. Identification of joint costs and common items may be accomplished either by assigning a separate cost company code to joint and common items or by maintaining subaccounts or subsidiary records on an account by account basis within each cost company, possibly by utilization of separate "Task Codes" within each cost company. Based on information provided by COMSAT, its 13 digit accounting code contains a five digit task code segment capable of capturing costs within each company as either a direct or overhead charge and could be used for this purpose.

[42] *See* Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, *Report and Order*, 6 FCC Rcd 5880, 5910-11 (1991); *see also, Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984) (The essential characteristic of an illegal tying or bundling arrangement "lies in the seller's exploitation of its control over [one] product to force the buyer into the purchase of a [second] product that the buyer either did not want at all or might have preferred to purchase elsewhere."

[43] IDB Aero-Nautical Communications, Inc. v. COMSAT, File No. E-93-008. The complaints include requests for expedited relief, allege that COMSAT is offering its maritime customers

stricter enforcement of structural separation requirements. Second, PAS argues that the issue of how COMSAT is structured to pursue its competitive and monopoly services cuts across all of its lines of business and cannot be dealt with on a piecemeal basis. Thus, PAS contends that the relief requested by COMSAT should be considered in a rulemaking proceeding pursuant to PAS' May 12, 1992, Petition.[44]

35. In response, COMSAT argues that the request is an unauthorized pleading pursuant to Section 1.45 of the Commission's Rules and should not be considered. In addition, COMSAT maintains that there is no substantive basis to grant PAS's request, and asserts that the allegations raised by IDB in its complaints should be handled by the Commission's complaint process.

36. We deny PAS' emergency request.[45] We see no reason to delay action on COMSAT's waiver request pending the Commission's resolution of the matters raised in IDB's complaints. We note that the complaint proceedings are in their early stages and will likely involve time consuming discovery and legal briefing as the parties attempt to establish their respective claims and defenses. In any event, we believe that the concerns raised by PAS in this proceeding regarding alleged anticompetitive conduct by COMSAT, which PAS believes should be remedied by stricter enforcement of structural separation requirements, are adequately addressed by the conditions we attach in granting the waiver request.[46] Included among these conditions is a requirement that COMSAT certify that it will comply with requirements pertaining to unbundling its maritime value-added services from its tariffed jurisdictional services. We have also conditioned the grant of the waiver on the Bureau's approval of nonstructural safeguard conditions covering nondiscrimination, network disclosure, customer proprietary network information, and accounting and cost allocation procedures. As for PAS's request that we initiate a rulemaking proceeding, we have fully considered this matter in paragraphs 13 and 14, *supra*. For the reasons stated there, we find no basis to grant PAS' request that we hold this waiver proceeding in abeyance until we address, in a rulemaking context, the broader issue of COMSAT's overall regulatory requirements.

IV. CONCLUSION

37. As indicated above, we deny PAS's initial request that we initiate a rulemaking to address COMSAT's request to offer maritime value-added services on an unseparated basis. We also deny PAS's later emergency request to hold this proceeding in abeyance pending Commission action on IDB's complaints against COMSAT or the initiation of a comprehensive rulemaking examining COMSAT's entire corporate structure.

38. We find that the *COMSAT Structure* orders do not authorize COMSAT to offer competitive, nonjurisdictional services in a manner other than through a separate subsidiary. Therefore, we deny COMSAT's petition for a declaratory ruling that such orders permit such activity on an unseparated basis. However, we also find that COMSAT has demonstrated that application of the general structural separation rule would not be in the public interest in the limited area of maritime value-added services as defined in this order. In lieu of separation, we are imposing specific nonstructural conditions to prevent, or minimize, any unfair competitive advantages associated with COMSAT's provision of these value-added services on an unseparated basis. Accordingly, we grant COMSAT's petition for waiver subject to the conditions described in this Order.

V. ORDERING CLAUSES

39. Accordingly, IT IS ORDERED THAT Pan American Satellite's Emergency Request to Hold Proceeding in Abeyance IS DENIED.

40. IT IS FURTHER ORDERED THAT COMSAT's petition for declaratory ruling or, in the alternative, for partial waiver of the structural separation requirements, File No. I-S-P-92-001, IS DENIED as to the declaratory ruling but GRANTED, subject to the conditions in paragraphs 22 to 33, as to the partial waiver.

41. IT IS FURTHER ORDERED THAT COMSAT shall not engage in any of the unseparated operations that are subject to this waiver, except as provided under the STA, until COMSAT has submitted its proposed nonstructural safeguard conditions as described in paragraphs 22 to 33 to the Common Carrier Bureau, and the Bureau has approved COMSAT's submission.

42. IT IS FURTHER ORDERED THAT, after an opportunity for public comment, the Common Carrier Bureau is delegated authority to determine whether or not the nonstructural safeguard submission to be filed by COMSAT is consistent with the terms of this order and to implement such a plan after approval.

43. IT IS FURTHER ORDERED THAT this waiver is granted pursuant to Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3.

44. IT IS FURTHER ORDERED THAT COMSAT's request for a waiver of structural separation allowing COMSAT's World Systems Division to provide sales, engineering, billing and administrative support to a corporate affiliate for the resale of cellular communications to ships, File No. I-S-P-91-004, IS DISMISSED.

45. IT IS FURTHER ORDERED THAT this order is effective upon release.

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equipment without charge and requests that the Commission order COMSAT to cease and desist from this practice and award IDB unspecified damages. In addition, IDB filed a request for emergency relief asking that the Commission order COMSAT to file tariff transmittals reflecting COMSAT's rates and practices for providing maritime satellite service and equipment that IDB claims do not appear in COMSAT's tariffs.

[44] *See supra* n.11.

[45] We consider PAS's pleading as a request for temporary relief pursuant to Section 1.45(d) of the rules and therefore accept the pleading. PAS also filed a reply to COMSAT's opposition to PAS's request. However, Section 1.45(d) of the rules provides that "[r]eplies to oppositions should not be filed and will not be considered".

[46] Moreover, we emphasize that the action we take here in granting COMSAT's request is without prejudice to any enforcement action the Commission may subsequently deem appropriate in ruling on IDB's complaint.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

CONCURRING STATEMENT OF COMMISSIONER ANDREW C. BARRETT

IN RE: Communications Satellite Corporation, Petition for Declaratory Ruling or, in the Alternative, for Partial Waiver of Structural Separation Requirements.

This Memorandum Opinion and Order [Order] denies a COMSAT request for declaratory ruling that would allow it to provide value-added maritime services on an unseparated basis from jurisdictional maritime services, subject to existing accounting safeguards. I agree with this interpretation, and fully support this aspect of the Order. The COMSAT Structure orders do not permit COMSAT to offer non-jurisdictional maritime services on an unseparated basis from jurisdictional maritime services authorized for INMARSAT signatories.[1]

I concur in the remaining portion of this Order which grants COMSAT's alternative waiver request to offer value-added maritime services on an unseparated basis, subject to nonstructural safeguards. I support this aspect of the Order to the extent it imposes a new set of accounting and nonstructural safeguard requirements on value-added maritime service to be offered by COMSAT.[2] The Order requires COMSAT to submit procedures to comply with our nonstructural safeguards prior to offering any value-added maritime services. These safeguards are imposed in an attempt to ensure that COMSAT does not discriminate against commercial providers in the maritime value-added services market.

Despite the safeguards imposed by this Order, I question whether COMSAT has justified Commission action on a waiver basis in this matter. While I agree that it appears to be economically inefficient to impose structural safeguards on COMSAT's offering of future value-added maritime services, I question whether the significant action of imposing nonstructural safeguards should be authorized by waiver instead of through a rulemaking. This waiver action sets a significant precedent. I believe the public policy issues surrounding the implementation of structural or nonstructural safeguards should be examined more thoroughly in a rulemaking. Thus, I question the procedural decision to take this action in a waiver context.[3] I am particularly concerned that COMSAT does not cross-subsidize its value-added services from the charges for its jurisdictional maritime services. In addition to non-structural safeguards, I believe the Commission also must examine the extent to which COMSAT faces enough competition from commercial U.S. providers in its basic jurisdictional markets. Thus, I would prefer to have conducted a rulemaking prior to authorizing the services permitted by this Order. For that reason, I concur.

SEPARATE STATEMENT OF COMMISSIONER ERVIN S. DUGGAN

In re: Communications Satellite Corporation Petition for Declaratory Ruling or, in the Alternative, for Partial Waiver of Structural Separation Requirements (File Nos. I-S-O-92-001, I-S-P-91-004)

After weighing this case, I am convinced that on balance, it is in the public interest to grant the waiver Comsat requests.

o First, Comsat's request for structural relief is limited to a narrow range of its services: maritime enhanced services and equipment. Granting this waiver in no way sets a precedent for granting any future request for similar relief with respect to other services.

o Second, there are potential public benefits from permitting integrated operations: greater efficiencies, for example, and the opportunity for customers to engage in one-stop shopping. The prospect of similar efficiencies led us, in 1991, to substitute nonstructural safeguards for structural separation for the Bell Operating Companies.

o Third, other Inmarsat signatories are already providing competing services on an integrated basis, while Comsat has been (prevented from doing so under our current rules.

o Finally, and most important, the nonstructural safeguards we impose today as a condition of the waiver are likely to be as effective as structural separation has been in preventing anticompetitive activity and cross-subsidies by Comsat.

I emphasize that our decision is narrow. If circumstances change substantially, or if Comsat should abuse its position, we are empowered (and indeed obligated) to reexamine today's decision. We also are free to modify the terms of the waiver if, in connection with some future proceeding, we decide to reexamine our regulatory approach for Comsat. Finally, we should be open to exploring ways to ensure that the rates for Comsat's space segment, upon which Comsat's maritime competitors today depend, are just, reasonable and nondiscriminatory.

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[1] See Order at 2-3. Recently, the Commission authorized COMSAT to expand its INMARSAT services to include ancillary land mobile service. In that Order, I stated my concerns regarding the extent to which this new service actually will be ancillary to its maritime services. I continue to believe that the Commission must carefully examine COMSAT's role in this area. See, Separate Statement of Commissioner Andrew C. Barrett, In re COMSAT Applications to Provide International Land-Mobile Satellite Services, Jan 12, 1993.

[2] More specifically, the Order requires COMSAT to offer value-added maritime services on an unbundled basis, subject to accounting, nondiscrimination, network disclosure and Customer Proprietary Network Information requirements.

[3] I do not consider the value-added services contemplated by this waiver to be insignificant additions to COMSAT's jurisdictional maritime, aeronautical, and land mobile services. See Order at 5.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of Quaker State Broadcasting Corp. 8310-HTS

Licensee of Station WTPA(FM)
Mechanicsburg, PA

For a Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: February 23, 1993; Released: March 2, 1993

By the Chief, Mass Media Bureau:

1. The Commission, by the Chief of the Mass Media Bureau, acting pursuant to authority delegated by Section 0.283 of the Commission's Rules, has under consideration: (1) a Notice of Apparent Liability (NAL), issued on September 23, 1992, for six thousand two hundred and fifty dollars ($6,250) against Quaker State Broadcasting Corporation ("Quaker"), licensee of Station WTPA(FM), Mechanicsburg, Pennsylvania and, (2) a response to the NAL filed October 19, 1992, requesting rescission or reduction of the forfeiture.

2. The NAL was issued to Quaker for its apparent willful violation of Section 73.1216 of the Commission's Rules. The Commission determined that during February 1992, the licensee of Station WTPA(FM) failed to conduct a contest as described. The announced prize was a two thousand dollar ($2,000) television set but the winner received only a one thousand and ninety-nine dollar ($1099) television set. The facts are set forth in full detail in the NAL, and will not be repeated here.

3. In addition to reiterating arguments already disposed of in the Notice of Apparent Liability, Quaker contends that the six thousand two hundred and fifty dollar ($6,250) forfeiture should be reduced or rescinded, because the Commission failed to consider the minor nature of the offense and WTPA(FM)'s overall compliance record, which are downward adjustment criteria under the *Policy Statement, Standards for Assessing Forfeitures,* 6 FCC Rcd 4695 (1991), *on recon.,* 7 FCC Rcd 5339 (1992), *pet. for review pending sub nom. USTA v. FCC,* No. 92-1321 (D.C. Cir. filed July 30, 1992).

4. We reject Quaker's argument that the violation is minor. The contest advertised a fifty-one inch big screen television valued at two thousand dollars ($2,000). Complainant received a thirty inch television set, valued at one thousand and ninety-nine dollars ($1099). Considering the prize awarded was significantly smaller in size and was valued at almost fifty percent less than advertised, we cannot consider this to be a minor violation.

5. We will, however, reduce Quaker's forfeiture because of its record of compliance with the Commission's Rules. For this reason, the Bureau will reduce the forfeiture to five thousand dollars ($5,000).

6. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, IT IS ORDERED that Quaker State Broadcasting Corporation, Mechanicsburg, PA, FORFEIT to the United States the sum of five thousand dollars ($5,000) for its willful violation of Section 73.1216 of the Commission's Rules. The payment should be in the form of a check or similar instrument, payable to the Federal Communications Commission. In regard to this forfeiture proceeding, the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Roy Stewart, Chief
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
February 23, 1993

Released: March 2, 1993

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

TV 14, Inc.	C5-602 (91)
Licensee,	C10-866
Station WTLK-TV	C4-434
2001 Palm Beach Lakes Blvd.	C5-271
West Palm Beach, FL 33409	C5-423

Dear Sir or Madam:

This letter constitutes a Notice of Apparent Liability for a forfeiture in the amount of twelve thousand, five hundred dollars ($12,500) pursuant to Section 503(b) of the Communications Act of 1934, as amended, for willful and repeated violation of the anti-lottery broadcast provisions of the United States Code, 18 U.S.C. Section 1304, and the Commission's Rules. This action is being taken by the Chief of the Mass Media Bureau pursuant to the delegation of authority in Section 0.283 of the Commission's Rules.

Our action is based on a finding that WTLK-TV broadcast "Outdoorsman Sweepstakes" spots that were violative of the prohibition against broadcast promotion of a lottery, i.e., an event involving prize, chance and consideration. In response to our initial inquiry, you admitted running the spots from February 3, 1991, through October 1991, but claimed consideration was absent on the grounds that the spots made clear that a free, alternate means to enter the event existed.

In response to our second letter of inquiry, you acknowledged that your response to our first inquiry had been inaccurate and that not all of the promotions you broadcast provided for a free, alternate means of entry. You explained that your first response was based on erroneous information you had initially received from the producer of "The Outdoorsman." You attached an affidavit in which the producer corrected the information and explained the previous inaccuracy.[1] It appears, therefore, uncontested that WTLK broadcast a promotion that contained all three elements of a lottery and that you violated 18 U.S.C. Section 1304 and Section 73.1211 of the Commission's Rules.

Furthermore, the violation apparently was repeated. Your attorney notes in an attachment to your latest letter that, according to the producer, the violation occurred only on February 16, 1991. The evidence before us, however, indicates otherwise. First, in responding to our initial inquiry, you apparently believed the spots were broadcast beginning February 3, 1991. Second, before February 16, 1991, the Commission's Field Operations Bureau (FOB) received a complaint that WTLK-TV was broadcasting spots promoting a lottery during the "Outdoorsman" show. A tape that FOB made on February 16, 1991, in response to that complaint clearly shows prize, chance, and consideration, thus adding credence to the complainant's claim of having seen such spots previously. Given the evidence, your uncertainty, and the "Outdoorsman" producer's record of providing you with inaccurate information, it appears that the violation occurred on at least two occasions, sometime between February 3, and February 16, 1991, and again on February 16, 1991. In view of the foregoing, it appears that Station WTLK-TV willfully and repeatedly violated 18 U.S.C. Section 1304 and 47 C.F.R. Section 73.1211 on the dates stated above. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, TV 14, Inc., licensee of Station WTLK-TV, is hereby advised of its apparent liability for a forfeiture of twelve thousand, five hundred dollars ($12,500).

The amount specified was reached after consideration of the factors set forth in Section 503(b)(2) of the Act and the guidelines described in our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *on recon.*, 7 FCC Rcd 5339 (1992), *pet. for review pending sub nom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992). Under these standards, $6,250 is the base forfeiture for a lottery violation. Because the violation was repeated, the forfeiture amount is increased and the total forfeiture amount is twelve thousand, five hundred dollars ($12,500).

In regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter to "show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. Section 1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[1] Resolution of this case was delayed by your failure to provide accurate information in response to our first inquiry. This failure apparently resulted from your laxity in reviewing programming you had received via satellite. We, therefore, caution you to exercise greater diligence in overseeing the programming of your station, both to prevent violations and to enable you to provide accurate information to the Commission in a timely manner. We note that, according to your response to our second inquiry, you have already taken steps to improve your oversight of programming received via satellite.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

Macro Cellular Partners

CCI RSA, Inc. File No. MSD-92-41

Columbus Cellular
Telephone Company

Licensee of Station KNKN852
in the Domestic Public Cellular Radio
Telecommunications Service on
Frequency Block A in Market No.
588, Ohio 4 - Mercer RSA)

ORDER

Adopted: February 24, 1993; Released: March 2, 1993

By the Chief, Common Carrier Bureau:

1. The Commission granted a cellular authorization for the Block A frequencies for the Ohio 4 - Mercer RSA, Market No. 588A, to Macro Cellular Partners (Macro). *See Public Notice*, Rpt. No. CL-90-295, Mimeo No. 4638 (released Aug. 30, 1990). Subsequently, the Commission approved a two-step assignment of license from Macro to CCI RSA, Inc. (a subsidiary of Cellular Communications, Inc. (CCI)), and then from CCI RSA, Inc. to Columbus Cellular Partners (Columbus), effective August 8, 1991. *See Public Notice*, Rpt. No. CL-91-196, Mimeo No. 14339 (released Aug. 9, 1991). CCI and Columbus in June 1992 brought to the Commission's attention information about Macro's application for the cellular authorization, noting *possible violations of the Commission's Rules. See* Letter to J. Cimko, Chief, Mobile Services Division, from T. Casey, Counsel for CCI and Columbus (June 24, 1992). The Common Carrier Bureau (Bureau) initiated an investigation into this matter.

2. The Bureau, Macro, CCI, and Columbus have reached an agreement which would terminate the Bureau's investigation. The terms and conditions of this agreement are contained in the attached Consent Decree.

3. We have reviewed the terms of the Consent Decree and evaluated the circumstances of this case. We believe that the public interest would be served by approving the Consent Decree, the terms of which are incorporated herein by reference.

4. Accordingly, IT IS ORDERED that the Consent Decree attached to this Order IS ADOPTED.

5. IT IS FURTHER ORDERED that the Bureau's investigation into the qualifications of Columbus Cellular Partners IS TERMINATED.

6. IT IS FURTHER ORDERED that this Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

ATTACHMENT

CONSENT DECREE

I. INTRODUCTION

1. This is a Consent Decree (the "Decree") between the Chief of the Common Carrier Bureau ("Bureau"), Macro Cellular Partners ("Macro"), Cellular Communications, Inc. ("CCI") representing CCI RSA, Inc., and Columbus Cellular Telephone Company ("Columbus").

2. Under the terms of this Consent Decree, Macro agrees to make a voluntary payment totalling $80,000 for deposit into the United States Treasury, and the Bureau terminates its investigation into the matters alleged in this proceeding.

II. BACKGROUND

3. The cellular authorization for the Block A frequencies for the Ohio 4 - Mercer RSA, Market No. 588A, was granted to Macro on August 30, 1990. Macro and CCI entered into an Assignment and Sale Agreement on May 21, 1991, and CCI and Columbus agreed that CCI would immediately assign the license of Station KNKN852 to Columbus. Applications seeking Commission consent to the two-step assignment of the authorization were filed. On August 8, 1991, the Commission approved the two-step assignment of the license, first to CCI RSA, Inc., which is a subsidiary of CCI, and then to Columbus. Columbus is 99-percent owned by New Par and 1-percent owned by Dayton Cellular Telephone Company, a subsidiary of New Par.

4. The two-step assignment was consummated on September 13, 1991. The Commission was subsequently notified that Columbus had become the Ohio - 4 Block A permittee. After acquiring the construction permit, Columbus completed construction of three cell sites in the RSA, each of which is currently operating. The RSA is part of the connection between New Par's fully integrated five-MSA system in southern Ohio and its fully integrated seven-MSA system in Michigan and Toledo, as well as its cellular system in Lima, Ohio. This arrangement permits subscribers to receive fully seamless cellular service throughout most of western Ohio.

5. In June 1992, CCI and Columbus informed the Commission that they recently had learned information that suggested possible violations of the Commission's Rules by Macro. In August 1992, CCI requested a Commission determination that Columbus' rights to retain the license to operate in Ohio RSA 4 had not been, and would not be, jeopardized by the information filed in Macro's original applications and disclosed by CCI and Columbus in June 1992. CCI and Columbus maintain that some of the partners of Macro were misidentified to the Commission in Macro's original construction permit application. In addi-

tion, various partners of Macro had assigned all or part of their interests in Macro to other parties, after the construction permit had been granted, without prior authority. The Bureau then began an investigation of these matters. If these allegations were true, Macro and its partners would have been in violation of various provisions of the Communications Act and the Commission's Rules. Macro maintained that misidentification of the partners was inadvertent because some individuals from earlier cellular lotteries did not participate in Macro's filings for Ohio RSA applications, other individuals then were substituted as partners before the Ohio RSA 4 -Mercer application was filed, and Macro's partnership organizer inadvertently failed to reflect the new individuals in the ownership disclosure exhibits included in Macro's application.

III. DEFINITIONS

6. For the purposes of this Decree, the following definitions apply:

(a) "Macro" means Macro Cellular Partners, or any of its successors in interest.

(b) "CCI" means Cellular Communications, Inc., or any of its successors in interest, and includes reference to CCI's subsidiary, CCI RSA, Inc.

(c) "Columbus" means Columbus Cellular Telephone Company, or any of its successors in interest.

(d) "Parties" means Macro, CCI, and Columbus.

(e) "Order" means an order of the Common Carrier Bureau adopting the terms and conditions of this Decree.

(f) "Final Order" means an Order of the Bureau that is no longer appealable or subject to administrative or judicial reconsideration, review, appeal, or stay.

IV. AGREEMENT

7. The Parties admit the jurisdiction of the Commission over them, and the subject matter of this action for purposes of this Decree and the Order adopting this Decree. *All necessary jurisdictional facts are hereby admitted for* purposes of this Decree.

8. The Parties waive any rights they may have to judicial review, appeal, or rights otherwise to challenge or contest the validity of any Order adopting this Decree. The Parties agree that upon signing by Macro, CCI, Columbus, and the Common Carrier Bureau, the provisions of this Decree shall be incorporated by reference in the attached Order formally adopting this Decree.

9. This Decree is for purposes of settlement only, and its signing does not constitute an admission by the Parties of any violation of law, rules, or policy.

10. In consideration for the Bureau's entering into this Decree and agreeing to terminate the enforcement proceeding, the Parties hereby agree to the following terms:

(a) Macro will make a voluntary contribution to the United States Treasury, without further protest or recourse, in the amount of $80,000.

(b) This amount shall be payable out of the funds currently held in the escrow account from the assignment of license by Macro of a portion of the funds otherwise payable to Macro. Both Macro and CCI agree to instruct the escrow agent to release and disburse $80,000 of the escrow fund to the United States Treasury within five (5) days after the Order adopting this Decree becomes a Final Order. Macro further agrees that the contribution of $80,000 to the United States Treasury may not be claimed as a tax deduction.

11. In light of the covenants and representations contained in this Decree, and in express reliance thereon, the Bureau will terminate its investigation of the issues raised in this proceeding. Such termination is without a finding by the Bureau of wrongdoing by the Parties. Further, the Bureau will not institute, on its own motion, any proceedings against any of the Parties based upon the information obtained during the informal investigation nor will it conduct further proceedings based upon the matters raised or investigated herein. The Bureau will not conduct further proceedings of any kind based on the matters raised or investigated herein unless information beyond that made available in this proceeding and which warrants inquiry is presented.

12. The Parties agree that any violation of the Order or this Decree shall constitute a separate violation of a Commission order, entitling the Commission to exercise any rights and remedies attendant to the enforcement of a Commission order.

13. If this Decree is not signed by the Bureau and each of the Parties, or is otherwise rendered invalid by any court of competent jurisdiction, it shall become null and void and may not be used in any fashion in a legal proceeding.

14. If the Commission, or the United States on behalf of the Commission, brings an action in any United States District Court to enforce the terms of the Order incorporating the terms of this Decree, the Parties agree that they will not contest the validity of the Order, will waive any statutory right to a trial *de novo*, and will consent to a judgment incorporating the terms of this Decree.

FEDERAL COMMUNICATIONS COMMISSION
COMMON CARRIER BUREAU

By: _____
Cheryl A. Tritt, Chief

MACRO CELLULAR PARTNERS

By: _____

CELLULAR COMMUNICATIONS, INC.

By: _____

COLUMBUS CELLULAR TELEPHONE COMPANY

By: _____

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-33

In the Matter of

Amendment of Section 73.202(b), RM-8160
Table of Allotments,
FM Broadcast Stations.
(Oakhurst and Firebaugh, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: February 8, 1993; Released: March 2, 1993

Comment Date: April 22, 1993
Reply Comment Date: May 7, 1993

By the Chief, Allocations Branch:

1. The Commission considers herein the petition for rule making filed on behalf of California Sierra Corporation ("petitioner"), licensee of Station KAAT(FM), Channel 296A, Oakhurst, California, seeking the substitution of Channel 276A for Channel 296A and modification of its license accordingly. In order to accommodate its request in conformity with the minimum distance separation requirements of the Commission's Rules, petitioner also requests the substitution of Channel 234A for vacant Channel 276A at Firebaugh, California.[1] Petitioner stated its intention to apply for Channel 276A if it is allotted to Oakhurst.

2. In support of the proposal, petitioner states that while it is presently precluded from upgrading on its present channel as Station KAAT(FM) would be short-spaced to Station KMMM(FM), Channel 297A, Madera, California, the channel substitutions will enable Station KAAT(FM) to increase its effective radiated power to 6 kilowatts on Channel 276A at Oakhurst. Therefore, we believe the public interest would be served by the proposal since it will enable Station KAAT(FM) to expand its coverage area.

3. Channel 276A can be allotted to Oakhurst consistent with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules at the petitioner's licensed site.[2] Additionally, Channel 234A can be substituted for Channel 276A at Firebaugh, California, without the imposition of a site restriction.[3]

4. We are also serving a copy of this *Notice* on the applicant for Channel 276A at Firebaugh. In the event Central Valley's application is reinstated, and this proceeding is finalized prior to the issuance of a permit for Channel 276A at Firebaugh, the applicant may amend its application accordingly. Such amendment may be accomplished without the loss of cut off protection. *See Salamanca, New York and Bradford, Pennsylvania,* 50 Fed. Reg. 26208 (1985) and *Sanibel, Florida,* 50 Fed. Reg. 32706 (1985).

5. Accordingly, we seek comments on the proposed amendments to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the communities listed below, as follows:

	Channel No.	
City	Present	Proposed
Firebaugh, California	276A	234A
Oakhurst, California	296A	276A

6. IT IS ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Notice* by Certified Mail, Return Receipt Requested, to the applicant for Channel 276A at Firebaugh, California, as follows: Central Valley Educational Services, Inc., 12550 Brookhurst Street, Garden Grove, California 92640.

7. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

8. Interested parties may file comments on or before **April 22, 1993,** and reply comments on or before **May 7, 1993,** and "are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

A. Wray Fitch III, Esq.
Gammon & Grange, P.C.
8280 Greensboro Drive
Seventh Floor
McLean, VA 22102

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

10. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that

[1] Although Channel 276A at Firebaugh is vacant, a petition for reconsideration has been filed by Central Valley Educational Services, Inc. ("Central Valley") seeking reinstatement of its application for Channel 276A (File No. BPED-881017MD).
[2] Coordinates for Channel 276A at Oakhurst are 37-25-08 and 119-44-04.
[3] Coordinates for Channel 234A at Firebaugh are 36-51-30 and 120-27-12. Channel 234A may also be used at the site proposed in Central Valley's application at coordinates 36-47-30 and 120-30-00.

no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-34

In the Matter of

Amendment of Section 73.202(b), RM-8100
Table of Allotments,
FM Broadcast Stations.
(Glenwood Springs, Colorado)

NOTICE OF PROPOSED RULE MAKING

Adopted: February 8, 1993; Released: March 2, 1993

Comment Date: April 22, 1993
Reply Comment Date: May 7, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the petition for rule making filed on behalf of Gardiner Broadcast Partners, Ltd. ("petitioner") seeking the allotment of Channel 224A to Glenwood Springs, Colorado, as that community's second local FM service. Petitioner states its intention to apply for Channel 224A if it is allotted to Glenwood Springs.

2. We believe the public interest would be served by proposing the allotment of Channel 224A to Glenwood Springs since it could provide a second local FM service to the community. Channel 224A can be allotted to Glenwood Springs consistent with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules[1] without the imposition of a site restriction.[2,3]

3. We believe the proposal warrants consideration since it could provide Glenwood Springs with an additional local aural transmission service. Accordingly, we will seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Glenwood Springs, Colorado, as follows:

	Channel No.	
City	Present	Proposed
Glenwood Springs, Colorado	256C3	224A, 256C3

4. IT IS ORDERED,That the Secretary shall send a copy of this *Notice of Proposed Rule Making* by Certified Mail, Return Receipt Requested, to the licensee of Station KMTS(FM), as follows: Colorado West Broadcasting, Inc., 1322-1/2 Grand Avenue, Glenwood Springs, CO 81601.

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **April 22, 1993,** and reply comments on or before **May 7, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioners, or their counsel orconsultant, as follows:

David M. Silverman, Esq.
Cole, Raywid & Braverman
1919 Pennsylvania Avenue, N.W.
Suite 200
Washington, D.C. 20006

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution

[1] Coordinates used for Channel 224A at Glenwood Springs are 39-32-36 and 107-19-18.

[2] We note that this proposal conflicts with the presently licensed operation of Station KMTS(FM) on Channel 224A at Glenwood Springs. Since Station KMTS(FM) was modified to specify operation on Channel 256C2 (and subsequently downgraded to Channel 256C3) for which a construction permit has been issued (File No. BPH-900906JE), *See Memorandum Opinion and Order, MM Docket No. 87-174*, 3 FCC Rcd 5560 (1988), we have determined that issuance of this *Notice of Proposed Rule Making* is appropriate at this time. However, we may withhold final action in this matter until Station KMTS is granted a license to operate on Channel 256C3 at Glenwood Springs. We will serve a copy of this *Notice of Proposed Rule Making* on Colorado West Broadcasting, Inc., licensee of Station KMTS(FM).

[3] Petitioner requested a specific site. However, the Commission does not generally afford protection for a prospective applicant's desired transmitter site where the allotment will be made available for application by all interested parties, since at the allotment level we do not require the sort of detailed technical antenna site showing required of an applicant, and petitioner has no guarantee that it will eventually become the permittee. *See Stuart and Boone, Iowa*, 5 FCC Rcd 4537 (1990).

of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-281

In the Matter of

Amendment of Section 73.202(b), RM-8118
Table of Allotments,
FM Broadcast Stations.
(Columbia Falls, Montana)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 8, 1993; Released: March 2, 1993

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 7 FCC Rcd 7847 (1992), issued in response to a petition filed by Frank Copsidas, Jr. ("petitioner"), permittee of Station KCWX, Channel 240A, Columbia Falls, Montana, proposing the substitution of Channel 240C2 for Channel 240A at Columbia Falls. Petitioner also requested modification of its construction permit (File No. BPH-911122MC) for Station KCWX to specify operation on Channel 240C2. Petitioner filed comments in which he reaffirmed his interest in the allotment of Channel 240C2 at Columbia Falls. Bee Broadcasting, Inc. ("Bee Broadcasting") filed comments. Petitioner filed reply comments.

2. Bee Broadcasting, licensee of Station KJJR(AM), Whitefish, Montana, and Station KBBZ(FM), Kalispell, Montana, alleges that the allotment of Channel 240C2 at Columbia Falls at petitioner's specified site will not provide city grade coverage to the entire community. According to Bee Broadcasting, from petitioner's site, more than twenty percent of Columbia Falls will not receive city grade coverage. Bee Broadcasting contends that the true purpose of the requested modification is to provide principal service to Kalispell and Whitefish, and not Columbia Falls. For these reasons, Bee Broadcasting requests that the proposed upgrade at Columbia Falls be denied.

3. In reply comments, petitioner disputes Bee Broadcasting's statements that the proposed upgrade at Columbia Falls will not serve the community with the required city grade coverage. Petitioner provides an engineering study confirming that complete line of sight coverage exists to enable Channel 240C2 to provide a full 70 dBu signal to the entire community of Columbia Falls at its selected site. Petitioner denies the claim made by Bee Broadcasting that service will be abandoned at Columbia Falls in order to serve Kalispell and Whitefish, Montana, and contends that the location of its studio outside of Columbia Falls is in compliance with the Commission's Rules. According to petitioner, the studio for Station KCWX could be located in Columbia Falls, Kalispell or Whitefish and be in compliance with Section 73.1125 of the Commission's Rules as the communities are located within the station's principal community contour.[1] Based on the above information, petitioner requests that Bee Broadcasting's allegations be rejected and the proposal for Columbia Falls be granted.

4. We believe the public interest would be served by the substitution of Channel 240C2 for Channel 240A at Columbia Falls, Montana, since it would provide the community with expanded service. In response to Bee Broadcasting's comments, a Commission engineering analysis confirms that city grade coverage will be provided to the community of Columbia Falls at petitioner's specified site. The substitution can be made in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules at petitioner's specified site.[2] Since Columbia Falls is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government has been obtained for this allotment. We shall also modify the construction permit for Station KCWX, Channel 240A, to specify operation on Channel 240C2 in accordance with Section 1.420(g) of the Commission's Rules.

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 15, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Columbia Falls, Montana	240C2

6. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the construction permit for Station KCWX, Columbia Falls, Montana, IS MODIFIED to specify operation on Channel 240C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

[1] Petitioner notes that Bee Broadcasting is the licensee of Station KBBZ(FM), Kalispell, Montana, and that its studio is located in Whitefish, Montana.
[2] The coordinates for Channel 240C2 at Columbia Falls are 48-27-35 and 114-20-25.

7. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Frank Copsidas, Jr., permittee of Station KCWX, is required to submit a rule making fee in addition to the fee required for the applications to effect the upgrade.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-32

In the Matter of

Amendment of Section 73.202(b),	RM-8174
Table of Allotments,	
FM Broadcast Stations.	
(Tracy, Minnesota)	

NOTICE OF PROPOSED RULE MAKING

Adopted: February 4, 1993; Released: March 2, 1993

Comment Date: April 22, 1993
Reply Comment Date: May 7, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Plum Creek Broadcasting Company, Inc. ("petitioner"), requesting the substitution of Channel 286C3 for Channel 286A at Tracy, Minnesota. Petitioner also requests modification of its construction permit (File No. BPH-890419JS) for Station KARL, Channel 286A, to specify operation on Channel 286C3. Petitioner submitted information in support of the proposal and expressed its intention to apply for the channel, if allotted.

2. We believe petitioner's proposal warrants consideration. Channel 286C3 can be allotted to Tracy, Minnesota, consistent with the Commission's spacing requirements at petitioner's specified site.[1] We shall also propose to modify the construction permit for Station KARL, Channel 286A, to specify operation on Channel 286C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. We believe the public interest would be served by proposing the substitution of Channel 286C3 for Channel 286A atH& Tracy, Minnesota, since it could provide the community with expanded local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Tracy, Minnesota	286A	286C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **April 22, 1993,** and reply comments on or before **May 7, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D. C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

John S. Neely
Miller & Miller, P.C.
P.O. Box 33003
Washington, D.C. 20033

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division Mass Media Bureau

[1] The coordinates for Channel 286C3 at Tracy are 44-13-46 and 95-44-36.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-459

In the Matter of

Amendment of Section 73.202(b),	RM-7009
Table of Allotments,	RM-7260
FM Broadcast Stations.	RM-7261
(Bay City, Brenham, Cameron,	RM-7262
Centerville, Edna, Ganado,	RM-7263
Giddings, Harker Heights,	RM-7264
Hearne, LaGrange, Matagorda,	
New Ulm, Point Comfort, Rollingwood,	
Rosenberg, and Seadrift, Texas)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 3, 1993; Released: March 2, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the *Notice of Proposed Rule Making and Order to Show Cause* in this proceeding, 4 FCC Rcd 7586 (1989), setting forth a proposal by Radio Lee County, licensee of Station KOKE (formerly KGID), Channel 268C2, Giddings, Texas, proposing the substitution of Channel 268C1 for Channel 268C2 at Giddings, and modification of the Station KOKE license to specify operation on Channel 268C1. Michael Escriva, Leonard Worden, Fort Bend Broadcasting, Inc., and Fayette Broadcasting Corporation filed counterproposals. Radio Lee County, Robert M. Mason, and May Broadcasting, Inc., filed comments. Radio Lee County, Fort Bend Broadcasting, Inc., Mid-Texas Communications, Inc., Point Comfort Broadcasting Company, Fayette Broadcasting Corporation, LaGrange Broadcasting Company, and Leonard Worden filed reply comments. For the reasons discussed below, we are substituting Channel 268C1 for Channel 268C2 at Giddings, Texas, and are modifying the license of Station KOKE to specify operation on Channel 268C1. In order to accommodate this upgrade, we are substituting channels at Cameron, Hearne, and Centerville, Texas. In a related vein, we are upgrading Station KULF at Brenham, Texas, and are allotting new FM channels to Point Comfort, Ganado, and Seadrift, Texas. Finally, we are either denying or dismissing proposals for Rollingwood, Matagorda, and Point Comfort, Texas.

2. *Background.* This proceeding began with the filing of a petition for rule making by Radio Lee County ("RLC") proposing the Channel 268C1 upgrade and modification of its Station KOKE license to specify operation on Channel 268C1. To accommodate this upgrade, RLC proposed the substitution of Channel 232A for Channel 267A at Cameron, Texas, and the modification of the construction permit of Station KJKS, Channel 267A, Cameron, Texas, to specify operation on Channel 232A; the substitution of Channel 276A for Channel 232A at Hearne, Texas, and the modification of the license of Station KHRN, Channel 232A, Hearne, Texas, to specify operation on Channel 276A; the substitution of Channel 285A for vacant but applied for Channel 269A at Edna, Texas; and the substitution of Channel 290A for vacant but applied for Channel 276A at Centerville, Texas.[1] In response to the *Notice of Proposed Rule Making and Order to Show Cause*, we received four counterproposals. The first counterproposal was filed by Michael Escriva proposing the allotment of Channel 284A to Matagorda, Texas, and the allotment of Channel 285A to Point Comfort, Texas. The second counterproposal was filed by Leonard Worden proposing the allotment of Channel 286A to Seadrift, Texas, and the allotment of Channel 283C3 to Ganado, Texas. The third counterproposal was filed by Fort Bend Broadcasting, licensee of Station KFRD, Channel 285A, Rosenberg, Texas, proposing the substitution of Channel 285C1 for Channel 285A at Rosenberg, and the modification of its Station KFRD license to specify operation on Channel 285C1. The fourth counterproposal was filed by Fayette Broadcasting Corporation, licensee of Station KBUK, Channel 285A, LaGrange, Texas, proposing the substitution of Channel 285C2 for Channel 285A, and reallotment of the channel to Rollingwood, Texas. All of the counterproposals conflict with the proposed Channel 285A substitution at Edna.

3. *Matagorda and Point Comfort, Texas.* Michael Escriva subsequently withdrew his counterproposal for Point Comfort and Matagorda.[2] Accordingly, the counterproposal will be dismissed without further consideration.

4. *Rosenberg, Texas.* We are dismissing the counterproposal filed by Fort Bend Broadcasting ("Fort Bend") for a Channel 285C1 upgrade at Rosenberg, Texas, due to Fort Bend's failure to serve RLC with a copy of the counterproposal as required by Section 1.420 of the Rules and paragraph 4 of the Appendix to the *Notice* in this proceeding. *See also Dushore, Pennsylvania*, 5 FCC Rcd 2022 (1990). In any event, we note that the proposed Channel 285C1 upgrade at Rosenberg would not have been granted in this proceeding. This upgrade proposal is short-spaced to the licensed facilities of Station KBUK, Channel 285A, LaGrange, Texas, and Station KRTX, Channel 285A, Galveston, Texas. In regard to the short-spacing with Station KRTX, Fort Bend suggests the substitution of Channel

[1] The petition for rule making filed by RLC included a statement from Joseph Kent Smitherman, permittee of Station KJKS, Channel 267A, Cameron, Texas, agreeing to the modification of his construction permit. Accordingly, it was only necessary to issue an *Order to Show Cause* against Freckles Broadcasting Corporation, licensee of Station KHRN, Channel 232A, Hearne, Texas, to show cause why its license should not be modified to specify operation on Channel 276A.

[2] Inasmuch as these counterproposals were filed prior to the October 4, 1990, effective date of the Commission action in *Amendment of Section 1.420 and Section 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3911 (1990), it was not necessary for Michael Escriva to include an affidavit that he received no consideration for his withdrawal.

263C3 for Channel 285A and reallotment of the channel from Galveston to Redland, Texas.[3] With respect to Station KBUK, Fort Bend notes that the licensee of Station KBUK has filed a counterproposal in this proceeding proposing the substitution of Channel 285C2 for Channel 285A and reallotment of the channel to Rollingwood, Texas. Those channel substitutions and reallotments would eliminate any short-spacing with a Rosenberg upgrade. However, as discussed in paragraph 6, *infra*, we are denying the Channel 285C2 upgrade and reallotment to Rollingwood. That denial would have been fatal to the Rosenberg upgrade proposal.

5. *LaGrange and Rollingwood, Texas.* Fayette Broadcasting Corporation ("Fayette Broadcasting"), licensee of Station KBUK, Channel 285A, LaGrange, Texas, and Roy E. Henderson, proposed assignee of Station KBUK, jointly filed a counterproposal in thisproceeding proposing the substitution of Channel 285C2 for Channel 285A, and reallotment of the channel to Rollingwood, Texas.[4] This counterproposal was filed pursuant to Section 1.420(i) of the Commission's Rules which provides for the reallotment of a channel to a new community and modification of the license or construction permit to reflect the new community. However, the reallotment to the new community must serve the Commission's allotment priorities and policies.[5] As such, it is necessary to evaluate the comparative merits of retaining Channel 285A at LaGrange, Texas, versus a Channel 285C2 allotment at Rollingwood, Texas.

6. We deny this counterproposal. We do not believe that this proposal would better serve the allotment priorities than retaining the existing allotment at LaGrange. Station KBUK is the only station licensed to LaGrange, Texas, a rural community of approximately 3,768 persons.[6] Fayette Broadcasting proposes to upgrade and relocate the channel to Rollingwood, Texas, which is part of the Urbanized Area of Austin, Texas. The respective populations of Rollingwood and Austin are 1,400 and 345,496 persons. In *Modification of FM and TV Authorizations to Specify a New Community of License* ("*Community of License*"), 5 FCC Rcd 7094 (1990), the Commission addressed the issue of removing the only local service from a community and reallotting the channel to another community located in an Urbanized Area. At the outset, the Commission stated that it would be a "rare" circumstance where the removal of an only local service would be in the public interest. We recognize that this counterproposal would provide Rollingwood with a first local service, and, in view of the proximity to Austin, Station KBUK would serve a greater number of persons as a Class C2 station licensed to Rollingwood. However, in determining whether a reallotment of the channel from LaGrange to Rollingwood would be consistent with the Commission's allotment priorities, we are not prepared, on the basis of information before us, to award Rollingwood a comparative preference as a first local service. It is our view that we would be allotting a new service to the Austin Urbanized Area. As such, retaining the only local service assigned to LaGrange, Texas, would better serve the Commission's allotment priorities and policies.

7. We stated in *Community of License* that we would examine proposals to award a first local service preference to a community in an Urbanized Area pursuant to the criteria enumerated in *RKO General, Inc. (KFRC)*, 5 FCC Rcd 3222 (1990); and *Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988). These cases clarified the type of evidence that we would consider in determining whether a suburban community should be denied a first local service preference. First, we examine the "signal population coverage," which the Commission has defined as the degree to which the proposed station could provide service not only to the suburban community but to the adjacent metropolis. Second, we examine the size of the suburban community relative to the central city, its proximity to the city, and whether the suburban community is within the Urbanized Area of the city. Third, we examine the interdependence of the suburban community with the central city, looking at evidence concerning work patterns, media and business services, and community services. Applying these criteria to this case, we first note that Station KBUK, as a Class C2 outlet licensed to Rollingwood, would provide primary service to the entire Austin Urbanized Area. As stated earlier, Rollingwood is, in fact, part of the Austin Urbanized Area, and the respective populations of Rollingwood and Austin are 1,400 and 345,496 persons. Furthermore, Fayette Broadcasting has not demonstrated that a community of 1,400 persons four miles from Austin is independent of Austin or the Urbanized Area. We believe that there is no basis in the record in this proceeding to award Rollingwood a comparative preference as a first local service over the loss of the only local service licensed to LaGrange, Texas.

8. With respect to the loss of the only local service licensed to LaGrange, Fayette Broadcasting suggests that Channel 222A could be allotted to LaGrange if we were to substitute Channel 247A for Channel 222A at New Ulm, Texas. This does not negate the loss of the only service licensed to LaGrange for two reasons. First, whether Channel 247A could ultimately be allotted to LaGrange through a rule making proceeding is speculative. Second, in *Com-*

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[3] In its counterproposal, Fort Bend notes that it had entered into a contract looking toward assignment of the Station KRTX construction permit, and that the permittee has agreed to "fully cooperate" in the effort to upgrade and reallot the channel. The subsequent assignment application (File No. BAPH-891214GQ), granted on April 4, 1990, was never consummated. The permittee of Station KRTX did not file any counterproposal by the December 8, 1989, comment date in this proceeding and is not otherwise a party in MM Docket No. 89-459. On April 27, 1990, Irwin Davis, now licensee of Station KRTX, filed a counterproposal in MM Docket No. 90-90 proposing the modification of the Station KRTX license to specify operation on Channel 263C3 at Redland, Texas. In view of our action dismissing the Rosenberg counterproposal and the fact that Irwin Davis did not file a timely counterproposal in this proceeding, we see no reason to consider the Station KRTX counterproposal in the context of MM Docket No. 89-459. We believe that it would be more conducive to the efficient transaction of Commission business to consider that upgrade proposal as a timely filed counterproposal in MM Docket No. 90-90.

[4] Roy E. Henderson subsequently withdrew his interest in pursuing the proposed reallotment. In view of the fact that Fayette Broadcasting has not withdrawn its interest, it remains necessary to resolve this matter.

[5] The FM priorities are (1) first aural service, (2) second aural service, (3) first local service, and (4) other public interest matters. Co-equal weight is given to priorities (2) and (3). *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982).

[6] Population figures are from the 1980 U.S. Census. The 1990 U.S. Census lists the population of LaGrange as 3,951 persons, Rollingwood as 1,388 persons, and Austin as 465,622 persons.

munity of License, the Commission specifically stated that the replacement of an operating station with a vacant allotment does not adequately cure the disruption of existing service to the public. In regard to LaGrange, the possibility for a reinstatement of local service at some future date is not an adequate substitute for either the loss or disruption of the local service provided by Station KBUK.

9. *Ganado and Seadrift, Texas.* Leonard Worden filed a counterproposal in this proceeding proposing the allotment of Channel 283C3 to Ganado, Texas, and Channel 286A to Seadrift, (Texas, as first local services.[7] The proposed Channel 288C3 allotment at Ganado conflicts with the proposed Channel 284A allotment at Matagorda, Texas, advanced by Michael Escriva. The proposed Channel 286A allotment at Seadrift conflicts with the proposed Channel 285A allotment at Point Comfort, Texas, also advanced by Michael Escriva. As indicated in paragraph 3, *supra*, Michael Escriva withdrew both of his counterproposals. There is no longer any impediment to the allotment of Channel 283C3 to Ganado, or a Channel 286A allotment to Seadrift.[8] We believe that both of these allotments as first local services would serve the public interest.

10. *Giddings, Cameron, Hearne and Centerville, Texas.* We are upgrading Station KOKE to specify operation on Channel 268C1.[9] We believe that increasing the service area of Station KOKE would serve the public interest. In order to accommodate this upgrade, we are making three channel substitutions.[10] First, we are substituting Channel 232A for Channel 267A at Cameron, Texas, and are modifying the construction permit of Station KJKS, Cameron, Texas, to specify operation on Channel 232A.[11] In turn, the Cameron substitution requires us to substitute Channel 276A for Channel 232A at Hearne, Texas, and modify the license of Station KHRN, Hearne, Texas, to specify operation on Channel 276A.[12] To accommodate the Hearne substitution, we are substituting Channel 290A for vacant but applied for Channel 276A at Centerville, Texas.[13] In accordance with *Circleville, Ohio*, 8 FCC 2d 159 (1967), Radio Lee County will be required to reimburse the permittee of Station KJKS and the licensee of Station KHRN for the legitimate and prudent costs incurred in changing their respective channels.

11. *Brenham and Point Comfort, Texas.* May Broadcasting, Inc. ("May Broadcasting"), licensee of Station KULF, Channel 231A, Brenham, Texas, has filed both a timely counterproposal in this proceeding and a separate petition for rule making. In both proposals, May Broadcasting proposes the substitution of Channel 231C3 for Channel 231A at Brenham, and the modification of its Station KULF license to specify operation on Channel 231C3. In order to accommodate this upgrade, May Broadcasting supports the proposed substitution of Channel 276A for Channel 232A at Hearne, Texas. As a procedural matter, we will consider both the counterproposal and the petition for rule making as a counterproposal in this proceeding. In a separate vein, Point Comfort Broadcasting Company has filed a petition for rule making proposing the allotment of Channel 231C2 to Point Comfort, Texas, as a first local service. The proposed Channel 231C2 allotment at Point Comfort is short-spaced to the proposed Channel 231C3 upgrade at Brenham, Texas (166 kilometers instead of the 177 kilometers required by Section 73.207 of the Commission's Rules).

12. We believe that both an upgraded FM service at Brenham and a first local service at Point Comfort would serve the public interest. In order to remove the conflict between these two proposals, we are upgrading Station KULF to Channel 231C3 at an alternate site.[14] In view of the alternate site for the Brenham upgrade, we are allotting Channel 231C2 to Point Comfort, Texas, as a first local service.[15]

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[7] The proposed Channel 283C3 allotment at Ganado is a substitute for an earlier petition for rule making filed by Leonard Worden proposing a Channel 284C2 allotment at Ganado (RM-7002).

[8] The reference coordinates for the Channel 283C3 allotment at Ganado, Texas, are 28-57-50 and 96-22-52. This site is 15.4 kilometers (9.6 miles) southwest of Ganado. The reference coordinates for the Channel 286A allotment at Seadrift, Texas, are 28-24-54 and 96-42-30. This site is 9.4 kilometers (5.8 miles) south of Seadrift. We have received Mexican concurrence for this allotment.

[9] The reference coordinates for the Channel 268C1 allotment at Giddings, Texas, are 29-55-00 and 97-20-00. This site is 48.2 kilometers (30.0 miles) southwest of Giddings. Because the petition for rule making was filed prior to October 2, 1989, Radio Lee County may avail itself of the provisions of Section 73.213(c)(1) of the Commission's Rules with respect to the Channel 269A allotment at Temple, Texas.

[10] In the *Notice*, we had also proposed the substitution of Channel 285A for Channel 269A at Edna, Texas. Robert M. Mason, applicant for the Channel 269A allotment at Edna, filed comments in opposition to the proposed Channel 285A substitution. In his comments, Mason argues that a Channel 285A allotment at Edna would prevent an ultimate 6 kilowatt operation by a Class A FM station at Edna. In a separate proceeding in MM Docket No. 92-56, we substituted Channel 241A for Channel 269A at Edna. 7 FCC Rcd 4135 (1992); *recon. denied*, 7 FCC Rcd 6266 (1992). In view of the fact that the Channel 241A allotment at Edna can operate at 6 kilowatts, it is not necessary to consider the Mason comments.

[11] The reference coordinates for the Channel 232A allotment at Cameron, Texas, are 30-57-00 and 96-54-07. Joseph Kent Smitherman, permittee of Station KJKS, may avail himself of the provisions of Section 73.213(c)(1) of the Commission's Rules with respect to the underlying allotment and pending applications for the Channel 233A allotment at Waco, Texas.

[12] The reference coordinates for the Channel 276A allotment at Hearne, Texas, are 30-51-07 and 96-34-04. Freckles Broadcasting Company, licensee of Station KHRN, did not file comments in response to the *Order to Show Cause* directed against it in this proceeding and is deemed to consent to the change. In this regard, we note that the above reference coordinates do not require a site relocation by Station KHRN.

[13] The reference coordinates for the Channel 290A allotment at Centerville, Texas, are 31-15-36 and 95-58-42. Caroline K. Powley, applicant for the Channel 276A allotment at Centerville, Texas (File No. BPH-900518MP), will be permitted to amend her application to specify Channel 290A without loss of cut-off protection.

[14] The reference coordinates for the Channel 231C3 allotment at Brenham, Texas, are 30-14-32 and 96-24-27. This site is 8.5 kilometers (5.3 miles) north of Brenham. As a benefiting party, May Broadcasting, Inc. will be required for reimbursing the licensee of Station KHRN for one half of the legitimate and prudent costs of changing its channel.

[15] The reference coordinates for the Channel 231C2 allotment at Point Comfort, Texas, are 28-38-44 and 96-21-17. We have received Mexican concurrence for this allotment.

13. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 15, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the communities listed below, as follows:

Community	Channel No.
Brenham, Texas	231C3, 291C2
Cameron, Texas	232A, 280C2
Centerville, Texas	290A
Ganado, Texas	283C3
Giddings, Texas	268C1
Hearne, Texas	276A
Point Comfort, Texas	231C2
Seadrift, Texas	286A

14. The window period for filing applications for the Channel 231C2 allotment at Point Comfort, Texas, the Channel 286A allotment at Seadrift, Texas, and the Channel 283C3 allotment at Ganado, Texas, will open on **April 16, 1993,** and close on **May 16, 1993.**

15. IT IS FURTHER ORDERED, That the counterproposal (RM-7260) filed by Michael Escriva proposing a Channel 284A allotment to Matagorda, Texas, and a Channel 285A allotment to Point Comfort, Texas, IS DISMISSED.

16. IT IS FURTHER ORDERED, That the counterproposal (RM-7264) filed by Fayette Broadcasting Company proposing the substitution of Channel 285C2 for Channel 285A and reallotment of the channel from LaGrange to Rollingwood, Texas, IS DENIED.

17. IT IS FURTHER ORDERED, That the counterproposal filed by Fort Bend Broadcasting, Inc. proposing the substitution of Channel 285C1 for Channel 285A at Rosenberg, Texas, and modification of its Station KFRD license to specify operation on Channel 285C1, IS DISMISSED.

18. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of May Broadcasting, Inc. for Station KULF, Brenham, Texas, IS MODIFIED to specify operation on Channel 231C3 in lieu of Channel 231A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order,* the licensee shall submit to the Commission a minor change application (FCC Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620 of the Commission's Rules; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

19. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Radio Lee County for Station KOKE, Giddings, Texas, IS MODIFIED to specify operation on Channel 268C1 in lieu of Channel 268C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order,* the licensee shall submit to the Commission a minor change application for construction permit (FCC Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620 of the Commission's Rules; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

20. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit of Joseph Kent Smitherman for Station KJKS, Cameron, Texas, IS MODIFIED to specify operation on Channel 232A in lieu of Channel 267A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in the authorization of Station KJKS except for the channel as specified above. Any other change, except those specified under Section 73.1260 of the Commission's Rules, require prior authorization pursuant to an application for a construction permit (FCC Form 301);

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Commission's Rules, PROVIDED the transmission facilities comply in all respects with the station authorization except for the channel as specified above, and a license application (FCC Form 302) is filed within 10 days of the commencement of program tests.

21. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Freckles Broadcasting Company for Station KHRN, Hearne, Texas, IS MODIFIED to specify operation on Channel 276A in lieu of Channel 232A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in the authorization of Station KHRN except for the channel as specified above. Any other change, except those specified under Section 73.1260 of the Commission's Rules, require prior authorization pursuant to an application for a construction permit (FCC Form 301);

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Commission's Rules, PROVIDED the transmission facilities comply in all respects with the station authorization except for the channel as specified above, and a license application (FCC Form 302) is filed within 10 days of the commencement of program tests.

22. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the following:

Joseph Kent Smitherman
Radio Station KJKS
P.O. Box 832
Cameron, Texas 76520

Freckles Broadcasting
Company
Radio Station KHRN
3917 Old Oaks
Bryan, Texas 77801

Caroline K. Powley
1536 Logan Avenue
Altoona, Pennsylvania 16602

23. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

24. For further information concerning this matter, contact Robert Hayne, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-243

In the Matter of

Amendment of Section 73.606(b), RM-7700
Table of Allotments,
TV Broadcast Stations.
(Frederiksted, Virgin Islands)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 4, 1993; Released: March 2, 1993

By the Chief, Allocations Branch:

1. At the request of Luis E. Rosa ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 7 FCC Rcd 7239 (1992), proposing the allotment of UHF Channel 66 to Frederiksted, Virgin Islands, as the community's first local television broadcast service. Petitioner filed comments in support of the proposal reaffirming his intention to apply for the channel, if allotted. No other comments were received.

2. We believe that the public interest would be served by the allotment of TV Channel 66 at Frederiksted, Virgin Islands, since it would provide the community with its first local television transmission service. Channel 66 can be allotted to Frederiksted in compliance with the Commission's minimum distance separation requirements.[1] Although the Commission has imposed a freeze on television allotments in certain areas, Frederiksted is not in one of the affected areas.[2]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 15, 1993** the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Frederiksted, Virgin Islands	66

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 66 at Frederiksted are North Latitude 17-42-48 and West Longitude 64-53-00.
[2] *See Order, Advanced Television Systems and Their Impact on the Existing Television Broadcast Service*, 52 Fed. Reg. 28346, July 29, 1987.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Applications for Review of the Common Carrier Bureau's Letter of Interpretation Regarding the Clarification of the Role of Direct Assignment in the Jurisdictional Separations Process	AAD 91-48

MEMORANDUM OPINION AND ORDER

Adopted: February 12, 1993; Released: March 3, 1993

By the Commission:

I. INTRODUCTION

1. On September 20, 1991, and September 23, 1991, respectively, the District of Columbia Public Service Commission (D.C. PSC) and Frederick and Warinner (F&W), a certified public accounting firm providing services to telephone companies, filed Applications for Review of the Common Carrier Bureau's August 21, 1991, Letter of Interpretation.[1] In the *Letter*, the Bureau interpreted the Commission's Part 36 jurisdictional separations rules and clarified the role of direct assignment in the jurisdictional separations process. In doing so, the Bureau rescinded two earlier Bureau interpretations offered in the tariff review context which permitted carriers, when separating costs between state and interstate services, to substitute direct assignment for the prescribed allocation procedures whenever possible.[2] In the *Letter*, the Bureau found that carriers may make such a substitution consistent with Part 36, only if direct assignment is explicitly allowed in the rules applicable to particular costs and revenues or is explicitly required in a Commission order. In the Applications for Review, both D.C. PSC and F&W request that the Commission overturn the Bureau's *Letter*. They claim that the general rules, set forth at the beginning of Part 36, permit carriers to use direct assignment whenever feasible, regardless of whether an allocation procedure is prescribed in the rules applicable to specific costs.[3] They argue, in effect, that the general rules have primacy over the specific rules. F&W's Application for Review also asks that the Commission reinstate the two previous Bureau interpretations and affirm that jurisdictional separations is built upon the principle of direct assignment. For the reasons stated below, we affirm the Bureau's *Letter* clarifying the use of direct assignment and revoking the two direct assignment interpretations contained in the *Tariff Waiver Order*. We therefore deny the Applications for Review.

II. BACKGROUND

2. Regulation of telephone services is shared between this Commission, which regulates interstate service, and state commissions, which regulate intrastate service. Telephone common carriers are thus subject to two regulatory jurisdictions. Jurisdictional separations is the process used by local exchange and interexchange carriers (LECs and IXCs, respectively) to apportion their costs and revenues between the state and interstate jurisdictions. The separations procedures, set forth in Part 36 of our rules,[4] require that the jurisdictional apportionment of costs be accomplished either through direct assignment or through the application of an appropriate relative use (or surrogate) factor. These two apportionment methods are described in the general description set forth in Section 36.1(c), which states:

> The fundamental basis on which separations are made is the use of telecommunications plant in each of the operations. The first step is the assignment of the cost of the plant to categories. The basis for making this assignment is the identification of the plant assignable to each category and the determination of the cost of the plant so identified. The second step is the apportionment of the cost of the plant in each category among the operations by direct assignment where possible, and all remaining costs are assigned by the application of appropriate use factors.

The two methods are also shown in the fundamental principles underlying the separations procedures, set forth in Section 36.2(a)(1). Section 36.2(a)(1) states: "Separations are intended to apportion costs among categories or jurisdictions by actual use or by direct assignment."

3. Section 36.1(c) introduces and describes the specific separations rules that follow, beginning with Section 36.101. The rules that follow provide, category by category, specific instructions for categorizing and separating investment, expenses, taxes, revenues, and reserves. Most of the cost apportionment rules provide that a particular allocator be used. In other cases, the rules specify that direct assignment must be used for a particular category or subcategory. A few rules allow the options of direct assignment or a prescribed allocation factor.

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[1] Clarification of the Role of Direct Assignment in the Jurisdictional Separations Process, Letter of Interpretation, 6 FCC Rcd 5068 (Com.Car.Bur. 1991) (*Letter*).

[2] *See, e.g.*, Annual 1988 Access Tariff Filing Petitions for Waiver, 2 FCC Rcd 5659 (Com.Car.Bur. 1987) (*Tariff Waiver Order*).

[3] 47 C.F.R. §§36.1 *et seq.* (1991). The general rules that apply to the entire separations process are stated in Sections 36.1 and 36.2. The cost- and revenue-specific rules are stated in Sections 36.101 through 36.507, which contain specific separations procedures that are to be used in categorizing and jurisdictionally apportioning particular costs and revenues.

[4] Part 36 was adopted by the Commission in 1988 to replace Part 67. Part 36, the separations rules, was developed by the Federal-State Joint Board; its Recommended Decision, setting forth proposed rules and rationales, was adopted by the Commission in its Report and Order, Amendment of Part 67 (New Part 36) of the Commission's Rules and Establishment of a Federal-State Joint Board, CC Docket No. 86-297, Report and Order, 2 FCC Rcd at 2639 (1987) (*Report and Order*). *See also* Recommended Decision, 2 FCC Rcd at 2582 (Joint Board 1987) (*Recommended Decision*), and Order on Reconsideration, 3 FCC Rcd 5518 (1988) (*Reconsideration Order*).

4. In the *Tariff Waiver Order*, the Common Carrier Bureau used a broad interpretation of Section 36.1(c) to allow direct assignment to the interstate jurisdiction in two cases where the specific rule did not provide for such assignment, trunk testing expenses and packet switching.[5] Recently, however, concerned with the LECs' expanded and inconsistent use of direct assignment and with the resulting inaccurate results, and believing that it had erred in its own overly broad application of Section 36.1(c) in the *Tariff Waiver Order*, the Bureau published its *Letter* to reestablish what it believed to be the original intent of the Part 36 rules, including direct assignment.[6] The *Letter* provided a clarified, limited role for the use of direct assignment in jurisdictional separations, and rescinded the previous Bureau interpretations contained in the *Tariff Waiver Order*. The Bureau explained that this action was necessary because its review of 1990 ARMIS reports[7] showed that many carriers were apportioning costs using procedures inconsistent with those prescribed in Part 36, in part based upon the incorrect interpretation in the *Tariff Waiver Order*. The *Letter* stated that the general provision in Section 36.1(c) is intended to supplement, not override, the more detailed procedures prescribed for apportioning specific costs. Thus, the Bureau concluded that this provision is not applicable to any cost category where the use of an allocation factor is prescribed and direct assignment is not stated to be an option.[8] The *Letter* noted that Section 36.1(c) does not allow carriers to use direct assignment at their own discretion to avoid using the prescribed allocation factors for particular cost categories.

5. D.C. PSC and F&W applied for review of the Bureau's *Letter*. On November 12, 1991, the Commission placed the Applications for Review on public notice. In response, ten parties filed comments and two parties filed reply comments.[9] All parties generally support the Applications for Review.

III. ISSUES

A. Interpretation of the Part 36 Rules

6. *Applications for Review.* In its Application for Review, D.C. PSC states that the Bureau's previous interpretation of Section 36.1(c), contained in the *Tariff Waiver Order*, required that all costs that can be directly assigned should be, and only those costs that cannot be directly assigned should be allocated based on usage. D.C. PSC states that this interpretation is correct and should be continued.[10] Similarly, the F&W Application for Review asserts that Section 36.1(c) has broad application, and requests that the Bureau's *Letter* be rescinded for several reasons.[11] F&W also notes that the broader interpretation is consistent with Section 36.2(a)(1).

7. *Comments.* All commenting parties except SW Bell support the Applications for Review in this argument.[12] Further, some parties assert that the *Letter* conflicts with Commission policy.[13]

8. *Discussion.* It is clear that some misunderstanding exists regarding the intent and application of Sections 36.1 and 36.2, and that SW Bell is correct in stating that a clarification is warranted. This proceeding allows us to provide clear guidance on this matter. We affirm the Bureau's *Letter* as accurately interpreting our Part 36 rules. Both of these sections constitute general rules that apply to the separations process as a whole. Section 36.1 describes that process and Section 36.2 identifies the fundamental principles on which the process is based.[14] These general

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[5] 2 FCC Rcd at 5662, para. 22; 5668, para. 64.

[6] State regulators had also become concerned with unprescribed use of direct assignment by the LECs, as evidenced by NARUC's "Resolution on Unprescribed Uses of Direct Assignment in Jurisdictional Separations," adopted July 24, 1991, at its Summer Meeting in San Francisco, CA. *See* NARUC Bulletin No. 31-1991, p. 8, Aug. 5, 1991 (*NARUC Resolution*).

[7] ARMIS is the Bureau's Automated Reporting Management Information System which consists of eight reports filed by the local exchange carriers (LECs). These reports contain financial and operating data which assist the Commission in its responsibility to monitor the telephone industry and administer its rules.

[8] The *Letter* also noted an exception to this limitation, *i.e.*, direct assignment is allowed where it has been explicitly required in a Commission order.

[9] Comments were filed by D.C. PSC; F&W; Ameritech Operating Companies (Ameritech); Cincinnati Bell Telephone Company (Cincinnati Bell); Southwestern Bell Telephone Company (SW Bell); Southern New England Telephone Company (SNET); U S West Communications, Inc. (US West); Lafourche Telephone Company (Lafourche); Cathey, Hutton & Associates (CHA); and Moss Adams Telecommunications Group (Moss Adams). Reply comments were filed by F&W; and John Staurulakis, Inc. (Staurulakis).

[10] D.C. PSC Application for Review at 2-4.

[11] F&W Application for Review at 4-6. F&W states that the interpretation in the *Tariff Waiver Order* was not erroneous but resulted from a common sense reading of Sections 36.1 and 36.2. Further, F&W states that the Commission codified, in Section 36.1(c), the underlying direct assignment principle using the Joint Board's language as expressed in the *Recommended Decision*. *Id.* at 5, *citing Recommended Decision*, 2 FCC Rcd at 2590, para. 71, which states "We believe that one of the basic principles of separations procedures is that all cost that can be directly assigned should be so apportioned and only the remaining cost should be apportioned on the basis of the prescribed allocator." Citing *Smith v. Illinois Bell*, F&W argues that the Supreme Court has mandated that separations must give full recognition to the actual use of the plant. F&W Application for Review at 6-9, *citing* Smith v. Illinois Bell Telephone Co., 282 U.S. 133 (1930); AT&T and the Associated Bell System Companies Charges for Interstate and Foreign Communications Service, 9 FCC 2d 30, 93 (1967); Illinois Bell v. Gilbert, 3 F. Supp. 595 (1933); Pacific Telephone & Telegraph v. Hill, 365 P.2d 1021 (Or. 1961), *rehearing denied*, 367 P.2d 790 (Or. 1962); and Pennsylvania PUC v. Bell of Pennsylvania, 16 PUR 3d 207 (Penn. PUC 1956).

[12] *See, e.g.*, Ameritech Comments at 2; SNET Comments at 2. SW Bell does not take issue with the *Letter*, but states that confusion still exists regarding the application of Section 36.1(c). SW Bell Comments at 2-3.

[13] *See, e.g.*, Ameritech Comments at 2-3; Cincinnati Bell Comments at 2; SNET Comments at 2-3.

[14] Both sections also are intended to serve a secondary purpose, which is to provide general instructions that supplement the cost- and revenue-specific rules set forth in Sections 36.101 through 36.507. We note that some of the cost- and revenue-specific rules, *e.g.*, Section 36.310, contain general instructions that apply to several categories of costs or revenue. These general instructions serve several purposes: to avoid unnecessary repetition throughout the specific rules; to fill in any gaps that might exist where a specific rule fails to prescribe an apportionment procedure; and to provide reference in cases where a

rules are not intended, however, to have primacy over the specific rules unless, as is the case for Section 36.2(e), the Commission states otherwise.[15] If the general introductory statement of preference for direct assignment had been meant as determinative, there would have been no need for specific language, in the rules that follow, to allow or encourage the use of direct assignment. Accordingly, both D.C. PSC and F&W are mistaken to infer from Sections 36.1(c) and 36.2(a)(1) that carriers may substitute direct assignment whenever possible for the allocation procedures prescribed by the specific rules. With the exception of Section 36.2(e), the general rules neither require nor allow such a substitution. Carriers must use the allocation procedures prescribed by the specific rules unless the use of direct assignment is explicitly permitted by those rules.[16] or, as is the case for certain billed costs and for sales agency expense,[17] is explicitly required in a Commission order.[18] We therefore affirm the Bureau's *Letter* as accurately interpreting our Part 36 rules.

9. Further, we reject the notion that the Bureau's clarification is somehow in conflict with the intentions of either the Joint Board or this Commission as expressed in the Part 36 rules.[19] As the F&W Application for Review and several commenters correctly note, both the underlying principle and the language of our rule in Section 36.1(c) come from the Joint Board's *Recommended Decision*. Nothing in the Bureau's *Letter* or in the instant order derogates from the Joint Board recommendation, or from the general principle of using direct assignment in the separations process. In fact, in accordance with the guidance provided by the Joint Board in its *Recommended Decision*, we adopted numerous specific rules that require or allow the use of direct assignment.[20] Furthermore, the Bureau's *Letter* responds to and is supported by state concerns as evidenced by the *NARUC Resolution*.[21]

10. We also reject parties' contentions that the Bureau's *Letter* conflicts with applicable law and Commission policy. For example, F&W argues, citing *Smith v. Illinois Bell*, that the Supreme Court has mandated that separations must give full recognition to the actual use of the plant. F&W asserts that any limitation on carrier discretion in the use of direct assignment constitutes "ignoring" the actual use to which the property is put. *Smith v. Illinois Bell* involved a situation in which a state regulatory commission, in an intrastate ratemaking proceeding, and the reviewing lower court failed to separate the property, revenues and expenses of the regulated company among the intrastate and interstate operations of the company's business. The Court faulted this failure to recognize the distinction between the intrastate and interstate use of the company's property, and held that an apportionment must be made in order to recognize and preserve the appropriate spheres of state and federal regulatory authority.[22] Contrary to the commenters' apparent position, however, the Court did not require a specific methodology (such as direct assignment) to recognize the use of regulated property; it simply held that some reasonable apportionment must be made. In fact, the Court observed that "extreme nicety is not required, only reasonable measures being essential."[23] Rather than "ignoring" or "disregarding" the intrastate and interstate uses of regulated telephone property, our Part 36 rules recognize and account for this distinction consistent with the holding of *Smith v. Illinois Bell*. Further, both the Joint Board and the Commission have stated that the separations procedures should provide a balance between the need to reasonably

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specific rule calls for the use of both direct assignment and allocation but does not indicate which procedure takes precedence over the other.

[15] Section 36.2(e) requires carriers to directly assign all costs billed to them by other telecommunications companies that have already determined, consistent with the Part 36 general principles, that such costs are entirely state or interstate in nature. This general rule does override specific rules because the Commission stated that it should do so. *See* Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, Decision and Order, released February 15, 1984, 96 FCC 2d 781, at 782, 810. *See also* Second Recommended Decision and Order, 48 Fed. Reg. 46556 at 46574 (Joint Board 1983).

[16] *See, e.g.*, §36.124(b). This cost-specific rule, applicable to Central Office Tandem Switching Equipment investment, requires carriers to use direct assignment to the extent possible and to use a prescribed allocation procedure for the remaining unassigned costs.

[17] *See Sales Agency Reconsideration Order*, 59 RR 2d 309 (1985), at para. 34.

[18] Carriers may, of course, petition for waiver of a specific separations rule for good cause shown, pursuant to the Commission's general waiver provision. 47 C.F.R. §1.3 (1991). A Commission decision to waive a specific allocation factor in individual circumstances would constitute the requisite authority for a carrier to employ direct assignment.

[19] We also reject SNET's argument that we "require" direct assignment in Part 64 and "specifically prevent it" here. As explained here, the purpose of the Bureau's *Letter* is not to "prevent" direct assignment, but to clarify its use. Further, the structure for using direct assignment in Part 64 is considerably different from that in Part 36. In our Part 64 cost allocation procedures, there are no specific apportionment rules outlining categories and subcategories for apportionment, so there is no need to interpret whether or not the specific rule means to directly assign, as is the case with Part 36. Rather, carriers subject to Part 64 design their own cost categories, using direct assignment whenever possible. The carriers' Part 64 Cost Allocation Manual is then subject to review and attestation by a public accounting firm.

[20] As an attachment to its Comments, Cincinnati Bell includes a listing of thirteen specific cost apportionment rules (and others for revenues and taxes) which prescribe that direct assignment be used either exclusively or as an alternative to usage-based allocation. Cincinnati Bell Comments at Attachment. In summary form, Cincinnati's examples are: §36.121(d) - COE General; §36.124(b) - Tandem Switching; §36.126(e)(3)(i) - Interexchange Circuit Equipment; §36.151(d) - Cable and Wire General; §36.153(a) - Cable and Wire Categories; §36.153(a)(1)(D) - Cable and Wire Categories; §36.154(b) - Cable and Wire Exchange Line; §36.155(a) - Cable and Wire Exchange Trunk; §36.156(b) - Cable and Wire Interexchange; §36.157(a)(2) - Cable and Wire Host/Remote; §36.354(a) - Access Expenses; §36.377 - Business Office Expenses; and §36.392(b) - Executive and Planning Expenses.

[21] *See* n.6, *supra*. The *NARUC Resolution* specifically noted the 80-286 Joint Board State Staff's concern that "certain carriers are using unprescribed direct assignment procedures which is undermining the uniform application of the separations procedures." In the same resolution, NARUC urged the Commission to "... clarify the role that direct assignment of costs and revenues should not be utilized where prescribed allocators exist in the rule."

[22] *Smith v. Illinois Bell*, 282 U.S. at 146-151.

[23] *Id.*, 282 U.S. at 150.

reflect cost causation principles and the goal of simplification, and that the current Part 36 Manual best achieves that balance.[24]

B. Apportionment Results

11. *Applications for Review.* Both Applications for Review argue that the restricted use of direct assignment as outlined in the *Letter* will cause inaccurate cost apportionment results.[25] F&W's Application for Review states that the failure to allow direct assignment in cases where the usage is jurisdictionally pure may mean that some costs are not recovered in either jurisdiction. F&W asserts that the interpretation set forth in the *Letter* will take costs that are appropriately directly assigned to a single jurisdiction, and will instead allocate them between jurisdictions, causing uneconomic and unjustified cross-subsidies.[26]

12. *Comments.* Several parties include specific examples of current or planned direct cost assignments that will have to be allocated, in view of the Bureau's *Letter.* In each case cited, the party states that the investment or expense cost is identifiable as wholly state or wholly interstate, and the specific Part 36 rules do not provide for directly assigning it.[27] Each commenter states that it is incorrect to allocate these costs between the jurisdictions because the jurisdictional identification has already been determined.

13. *Discussion.* The Bureau's review of ARMIS reports and other carrier data shows that in some cases carriers have substituted procedures which they call direct assignment, for the Part 36 procedures that prescribe an allocation factor and do not permit direct assignment.[28] Despite the claims of the commenting parties, this use of substitute procedures does not always improve the accuracy of separations results. Indeed, the Bureau's review shows that it can produce less accurate results. The Bureau found instances where carriers have carved out a portion of a cost category for selective and unprescribed direct assignment and then applied the prescribed allocation factor to the remainder of the category. Because the prescribed factor is designed to be applied to the entire category, not just the residual portion, this selective use of direct assignment can produce distorted results for the category as a whole.[29]

14. One reason for this distortion is that, when the allocation factor is based on relative usage, it may be difficult or impossible for carriers to ensure that the usage associated with the directly assigned cost is excluded from the allocation factor applied to the unassigned residual cost. Similarly, when the allocation factor is based on the separations of total costs in specific plant or expense accounts (*e.g.,* the accounts in Big Three Expenses),[30] it is difficult or impossible for carriers to adjust the prescribed factor to remove that portion of the plant investment or expense associated with the directly assigned cost. Even when carriers are able to make such adjustments, regulators may find verification difficult because the adjustments produce nonuniform results among carriers and are based on special studies or usage records that are not reported in ARMIS.

15. Another reason for the distortion is that the costs to which these allocation factors apply are predominantly joint or common with respect to state and interstate services. This cost characteristic makes direct assignment difficult or impossible for such costs; this is the primary reason why these prescribed allocations are required. In view of the potential difficulties associated with the use of direct assignment, the Joint Board and this Commission purposely restricted its use to specific costs rather than allowing its use at each carrier's discretion.[31] Our Part 36 rules specifically provide that cost apportionment be accomplished through allocation exclusively, through a combination of allocation and direct assignment, or through direct assignment exclusively, because we have already determined those instances where selecting some costs for direct assignment improves the accuracy of the resulting apportionment.

16. Further, the commenting parties generally overstate the extent to which the Bureau's interpretation forces carriers to allocate a jurisdictionally pure cost between state and interstate operations. Ameritech and SW Bell, for example, claim the *Letter* implies that the amounts billed by one carrier to another carrier for the provision of billing and collection services cannot be directly assigned even though the provider identifies the billed amounts as state

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[24] *See Recommended Decision,* 2 FCC Rcd at 2585, para. 20. *See also Report and Order,* 2 FCC Rcd at 2639.

[25] In its Application for Review, D.C. PSC states that the Chesapeake and Potomac Telephone Company of D.C. (C&P) uses the interpretation contained in the *Tariff Waiver Order* to directly assign trunk testing expenses. D.C. PSC adds that if the *Letter* prohibits C&P from using this methodology, revenue requirements of $4.2 million would shift to the state jurisdiction. In a recent order, the Bureau denied C&P's petition for waiver of the *Letter* to allow C&P to continue its procedures for the allocation of trunk testing expenses. The Bureau stated that the C&P procedures constituted a substitute allocation method, not direct assignment. Chesapeake and Potomac Telephone Company Petition for Waiver of the Common Carrier Bureau's Letter of Interpretation, 7 FCC Rcd 3622 (Com.Car.Bur. 1992) (*C&P Order).*

[26] F&W Application for Review at 8-9.

[27] Ameritech Comments at 3 (Account 6623, Customer Operations expense, jurisdictionally identified using subsidiary accounting records); Cincinnati Bell Comments at 3 (state-only packet switching); US West Comments at 4 (interstate-only packet (switching); SNET Comments at 2 (AT&T interstate-only leases); CHA Comments at 3 (cable and wire facilities in interstate-only leases); SW Bell letter to Gerald Vaughan, Deputy Chief (Operations), Common Carrier Bureau, dated November 8, 1991 (Account 6623, Customer Operations expense for state-only toll services billing).

[28] When the Bureau examined the "direct assignment" procedures that carriers claimed they were applying to these types of cost, it found many instances in which the substitute procedure was not direct assignment but, rather, a self-selected allocation procedure not authorized by our rules. The Bureau found, for example, that an apportionment procedure used by the Chesapeake and Potomac Telephone Company (C&P) was not direct assignment, as C&P had claimed, but an alternative allocation procedure. *See C&P Order,* 7 FCC Rcd at 3624, para. 16.

[29] In the *C&P Order,* the Bureau gives a numerical and hypothetical example to explain the manner in which this distortion can occur. *Id.* at 3624 n.15.

[30] *See* Section 36.112(a).

[31] The Joint Board and this Commission decided that the use of direct assignment should be encouraged for the apportionment of certain costs. *See, e.g., Recommended Decision* at para. 71. Conversely, they also decided that direct assignment should not be used for the apportionment of other costs. *Id.* at paras. 38 and 39.

or interstate in nature. This is not so. In the *Letter*, the Bureau acknowledges that carriers may substitute direct assignment for prescribed allocation procedures when required to do so in a Commission order, as is the case for such expenses. Indeed, as stated earlier,[32] this is the case for all billed costs that have been identified as jurisdictionally pure by carriers that perform jurisdictional separations.[33]

17. Six carriers state here that they are using or proposing idiosyncratic forms of direct assignment to determine jurisdictional costs in lieu of the prescribed procedures where direct assignment is not an option. We now clarify that, unless the direct assignment is explicitly required in a Commission order or permitted by a waiver, this practice violates our rules. The unprescribed use of direct assignment detracts from the uniformity and predictability needed by this Commission, and distorts the separations results. The direct assignment limitation outlined in the Bureau's *Letter*, applied in the Bureau's *C&P Order*, and affirmed herein, was specifically designed to eliminate such inaccuracies. We reject assertions that carriers could experience a situation in which costs could not be recovered in either jurisdiction; the Part 36 rules establish separations allocations under which all costs are apportioned to either the federal or the state jurisdiction, and both federal and state commissions apply those rules.

18. We recognize, however, that there may be specific situations in which the applicable separations rule does not provide for direct assignment, yet costs can be jurisdictionally identified through appropriate accounting records, subsidiary records, or special studies, and such identification would not undermine the accuracy of the allocation process for any remaining costs. Of course, the separations rules are designed to effect a fair jurisdictional split on a category-by-category, not a dollar-by-dollar, basis; it is unavoidable that some inaccuracies will exist. Despite the need for uniformity and predictability in the application of the separations rules, it is not our desire or intent to create patently unfair results. Accordingly, we invite any carrier experiencing such a situation to file a petition for waiver or rulemaking.[34]

19. The consistency, predictability, and uniformity we require in the application of our rules would be diminished if we were to allow unfettered carrier discretion. The Commission must provide fairness to carriers and to users; it must guarantee that its accounting safeguards are adequate and reliable. If each carrier were to follow its own procedures, applying its own rules and interpretations, this Commission's ability to assess each carrier's performance or the lawfulness of its provision of service, its rates, and its operations would be significantly impaired. This would severely hamper the ability of both federal and state regulators to make valid comparisons of carrier data.[35]

C. Legal Sufficiency of the Letter

20. In the applications for review and in the comments filed, the parties have raised the issue of the legal sufficiency of the Bureau's action in the *Letter*. Generally, as discussed below, the parties make two arguments: (1) they believe that the Bureau's interpretation regarding the use of direct assignment exceeds the Bureau's authority because it constitutes an amendment of our separations rules, and as such must be referred to a Federal-State Joint Board, pursuant to Section 410(c) of the Communications Act; and (2) they assert that the Bureau's *Letter* subverted their due process rights. Further, some parties assert that the interpretation set forth in the Bureau's *Letter* is in conflict with Commission policy. We conclude, however, that the interpretation established in the *Letter* is a correct reading, and not a modification, of the Part 36 rules. As stated above, we find that the *Letter* is fully consistent with Commission policy. Accordingly, no Joint Board referral is needed, and no due process rights even arguably accrue.

21. *Applications for Review*. The F&W Application for Review argues that the Joint Board *Recommended Decision*, adopted by the Commission without modification, clearly establishes that direct assignment is the first-choice means of allocation, with "only the remaining cost" to be apportioned using prescribed allocators.[36] D.C. PSC asserts in its Application for Review that the interpretation in the *Tariff Waiver Order* was consistent with the meaning of Section 36.1(c), and that the *Letter* provides a reinterpretation without citing any precedent for what D.C. PSC terms an "about face." D.C. PSC contends that the *Letter* does not show that the earlier interpretation is inconsistent with any FCC rule, and that the new interpretation is a "*sub silentio* amendment of the separations rules" and is therefore legally insufficient, absent referral to a Joint Board.[37]

22. *Comments*. Virtually all comments state agreement with F&W's assertion that the *Letter* constitutes a modification of the separations rules[38] and as such requires referral to the Joint Board.[39] Several commenters reiterate the re-

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[32] *See* note 15 above.

[33] Jurisdictional separations is performed formally, *i.e.*, pursuant to the Part 36 rules, by cost companies, and is performed informally by average schedule companies. *See* Crockett Telephone Co. v. FCC, 963 F.2d 1564 (D.C. Cir. 1992).

[34] Carriers seeking rulemaking or waiver should keep in mind, however, that variations among carriers are always present, and that this was considered by both the Joint Board and the Commission in the rulemaking proceeding that produced Part 36. Thus any petition for rulemaking or waiver must, to be successful, not undercut the need for uniformity and category-level accuracy that underlies the rules. Benefit, or at least no harm, must be shown for the whole category-level allocation results. In such petitions, the carriers should pay particular attention to the supporting records being relied upon to determine the direct assignment of the cost element. We will require details regarding the nature, scope, and validity of these records, and specifically how they reflect only jurisdictionally pure costs. Carriers are cautioned that an apportionment process that includes the use of a usage-based allocation factor (or surrogate) at any point in the process does not qualify as direct assignment. *See C&P Order*, 7 FCC Rcd at 3623, para. 9. Further, we will require a factual presentation demonstrating why the use of the prescribed allocator will produce both harmful and unintended results, and cause a substantial undue financial burden.

[35] This is especially true under price cap regulation, where benchmarking comparisons among companies and within companies over time are particularly important.

[36] F&W Application for Review at 5, *citing Recommended Decision*, 2 FCC Rcd at 2590, para. 71.

[37] D.C. PSC Application for Review at 2-3; *accord*, F&W Application for Review at 9.

[38] *See, e.g.*, Ameritech Comments at 2; Cincinnati Bell Comments at 1-2; F&W Comments at 2; Lafourche Comments at 1; US West Comments at 2.

[39] *See, e.g.*, Ameritech Comments at 3; Cincinnati Bell Comments at 5; SNET Comments at 3 (citing Section 410(c) of Communications Act); Staurulakis Reply Comments at 2. *See also* SW Bell Nov. 4 letter to Chief, Accounting and Audits Division.

quest that the Commission rescind the *Letter*.[40] F&W argues that the Bureau's action (*Letter)* is not only wrong but also exceeds the Bureau's authority.[41]

23. In addition, some commenters attack the *Letter* as improper under the Administrative Procedures Act (APA) because the affected parties have not been given notice and the opportunity to comment.[42] Commenters note the history of direct assignment policies and cite their reliance on their understanding of the use of direct assignment.[43] Commenters offer specific reasons for preferring the broader interpretation to that proposed in the *Letter*.[44] Finally, as discussed above, several commenters argue that the policy set forth in the Bureau's *Letter* appears to be inconsistent with the Commission's established policy of cost causation.[45] Asserting unanimous support for its position, F&W urges that the Commission review and rescind the Bureau's *Letter*.[46]

24. *Discussion.* The Bureau's *Letter* is an interpretation of existing rules, not a new rule or modification. The Bureau, under delegated authority from this Commission, is well within its authority (and, indeed, its responsibility) to interpret the Commission's rules and to revisit prior interpretations, especially when, as here, it has observed uncertainty and inconsistency in the application of the rules by various carriers.[47] Bureau interpretations of Commission rules are, of course, subject to review by the Commission. The review process serves to ensure that Bureau decisions are consistent with our rules and policies. In this case, contrary to the assertions of various parties that the *Letter* constitutes a modification of the Commission's rules or policy, we find the Bureau's action fully consistent with our existing rules and policies, and necessary in the face of data indicating carrier misapplication thereof. Applicants here argue that the Joint Board intended something different from what is shown in the *Letter*, but the two constituent parts of the Joint Board, the state commissions (as represented by NARUC) and the federal (as represented by the Bureau and this Commission) have declared with great clarity their intention regarding these rules.[48] Parties' reliance on the general terms of Section 36.1(c) to override rules that apply to each specific allocation appears due more to carrier preference and convenience than to any legal argument.

25. Our finding that the Bureau's *Letter* is an interpretation, and not a modification, of the Commission's rules effectively refutes arguments regarding referral to a Joint Board, compliance with the Administrative Procedure Act, and any arguable due process concerns. According to Section 410(c) of the Communications Act, referral to a Joint Board is mandated only in case of the institution of a rulemaking proceeding.[49] Similarly, the Administrative Procedure Act (APA) requirements of notice and comment apply only to rulemaking proceedings.[50] The Bureau is well within its authority to interpret, without further procedure, Commission rules that it administers; when it notes, as it did in this case, uncertain and inconsistent application of Commission rules, the Bureau has the responsibility of clarifying the rules.[51] To those parties complaining that they were deprived of the opportunity to comment before publication of the Bureau's clarification, we note that no right to such opportunity is engendered by an interpretation. These parties have in any case been afforded the opportunity to comment, through the mechanism of these applications for review and the proceedings they initiated.[52]

IV. CONCLUSION AND ORDERING CLAUSE

26. In adopting the Joint Board's *Recommended Decision* creating Part 36, the Commission also adopted the general description (Section 36.1(c)) and the fundamental principle (Section 36.2(a)(1)) which refer to the use of direct assignment in jurisdictional separations. These sections in Part 36 were meant to explain the repeated reference, throughout the specific rules that follow, to the use of direct assignment, sometimes as mandated, and in a few cases as an alternative to the particular prescribed allocator. Further, these sections were meant to supplement, not override, the specific rules that followed. Sections 36.1(c) and 36.2(a)(1) were not meant to create a general invitation to use direct assignment, or something that could be characterized as direct assignment, at the convenience (and to the benefit) of the filing carrier. The broadening and expansion of the definition and application of direct assignment by carriers has produced distorted and inaccurate cost apportionments as well as a lack of uniformity and reviewability. The Bureau's *Letter* was an attempt to cut this waywardness short by clarifying that direct assignment plays an important but limited role in the jurisdictional separations process. The broader role sought by parties here was not intended by either the Joint Board or this Commission, and would not serve the public interest.

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[40] *See, e.g.*, Ameritech Comments at 2; SNET Comments at 2; Staurulakis Reply Comments at 1-2.

[41] F&W Comments at 2. *See also* Ameritech Comments at 3; Cincinnati Bell Comments at 5; SW Bell Comments at 2-3; SNET Comments at 3; US West Comments at 4; Lafourche Comments at 4; and Staurulakis Reply Comments at 2.

[42] US West Comments at 3-4, *citing* APA §§553 *et seq.*; *accord,* Lafourche Comments at 4; SNET Comments at 3, n.14.

[43] *See, e.g.*, Lafourche Comments at 3-5; US West Comments at 4-6.

[44] CHA Comments at 2.

[45] *See, e.g.*, CHA Comments at 4-5.

[46] F&W Reply Comments at 1-2; *accord* Staurulakis Reply.

[47] The *Letter* is legally sufficient not only to state the correct interpretation of the rule, but also to correct an earlier, incorrect Bureau interpretation.

[48] *See NARUC Resolution.* Both the Joint Board and this Commission considered carefully, as noted above, not only how and under what circumstances direct assignment should be used in the jurisdictional separations process, but also how its use should be set forth in the rules. While Section 36.1(c), as a general description of Part 36 and Section 36.2(a)(1) as a principle of the jurisdictional separations process, both state that the use of direct assignment is fundamental, the specific use of direct assignment is then prescribed in the specific rules that follow.

[49] 47 U.S.C. §410(c).

[50] Administrative Procedure Act, 5 U.S.C. §§553 *et seq.*

[51] To the extent that the Bureau erred in promulgating an incorrect interpretation in the *Tariff Waiver Order*, it has corrected its error through release of its *Letter*. Any remaining uncertainty about the correct interpretation is removed by this Commission action affirming the *Letter* 's interpretation.

[52] We note also that under Section 1.106 of the Commission's rules, any interested party had the right to petition the Bureau for reconsideration of its *Letter*, as well as applying to the Commission for review.

27. Accordingly, IT IS ORDERED, pursuant to Sections 1.115 and 36.1 *et seq.* of the Commission's rules, 47 C.F.R. §§1.115, 36.1 *et seq.*, that the Applications for Review of the Letter of Interpretation on Direct Assignment filed by the District of Columbia Public Service Commission and Frederick and Warinner ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELESPHERE NETWORK, INC.,
Complainant,

v.

INDIANA BELL TELEPHONE COMPANY, INC.	File No. E-90-167
MICHIGAN BELL TELEPHONE COMPANY,	File No. E-90-168
OHIO BELL TELEPHONE COMPANY,	File No. E-90-169

and

SOUTHWESTERN BELL TELEPHONE COMPANY,	File No. E-90-170

Defendants.

MEMORANDUM OPINION AND ORDER

Adopted: January 29, 1993; Released: March 4, 1993

By the Commission:

TABLE OF CONTENTS

Topic	Paragraph No.
I. INTRODUCTION	1
II. BACKGROUND	2 - 6
III. DISCUSSION	7 - 36
A. Liability for Damages	7 - 18
1. Contentions of the Parties	7 - 12
2. Discussion	13 - 18
B. Damages and Interest Claims	19 - 37
1. Damages	20 - 33
a. Contentions of the Parties	20 - 26
b. Discussion	27 - 33
2. Interest on Damages	34 - 36
a. Contentions of the Parties	34 - 35
b. Discussion	36
IV. CONCLUSION	37
V. ORDERING CLAUSES	38 - 40

I. INTRODUCTION

1. In this Memorandum Opinion and Order we find that the complainant in these consolidated Section 208 proceedings,[1] Telesphere Network, Inc. (Telesphere),[2] has met its burden of establishing that the defendant local exchange carriers (LECs) have violated Section 201(b) of the Communications Act by earning in excess of the rate of return for interstate access services prescribed by the Commission for the period January 1, 1987 through December 31, 1988. In addition, we award Telesphere damages and interest from Southwestern Bell Telephone Company (SW Bell) in the amounts specified below.

II. BACKGROUND

2. The case presented by the complainant is virtually identical to that presented by the complainant in *MCI Telecommunication Corporation v. Pacific Northwest Bell Telephone Co.*[3] In that proceeding, we held that LEC rates that produced earnings in excess of a Commission prescription were unjust and unreasonable within the meaning of Section 201(b) of the Communications Act (the Act).[4] We also held that a complainant/customer is entitled to recover damages to the extent that it can show that it suffered actual damage as a consequence of such violations. Subsequently, in the damages phase of the proceeding, we held that MCI had properly shown that it had been harmed by paying the defendants' rates that produced the excessive earnings. We awarded the complainant monetary damages, plus interest computed at the IRS rate.[5]

3. A detailed accounting of the Commission's rate of return regulatory scheme as well as relevant Commission and court decisions is set forth in the *MCI Liability Order* and the *MCI Damages Order* [6] and will not be repeated at length here. However, a brief discussion of the development and implementation of the Commission's rate of return prescription is helpful to our analysis of the instant complaints.

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[1] While Telesphere filed separate complaints against the named defendants, the proceedings have been consolidated for disposition due to the similarity of the issues and arguments raised by the parties.

[2] Telesphere is currently a debtor in bankruptcy before the United States Bankruptcy Court for the Northern District of Illinois.

[3] MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co., *et al.*, 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon. denied*, 5 FCC Rcd 3463 (1990) (*MCI Reconsideration Order*) (jointly "*MCI Orders*"), *appeal dismissed sub nom. Mountain States Tel. and Tel. Co., et al. v. FCC*, 951 F.2d 1259 (10th Cir. 1991) (per curiam). *See also*, American Tel. & Tel. Co. v. Northwestern Bell Tel. Co., 5 FCC Rcd 143 (1990) (*AT&T Liability Order*), *appeal dismissed sub nom. Mountain States Tel. and Tel. Co., et al. v. FCC*, 951 F.2d 1259, (10th Cir. filed March 6, 1990).

[4] Section 201(b), 47 U.S.C. § 201(b), provides that "[a]ll charges, practices, classifications, and regulations for and in connection with ... communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful."

[5] MCI Telecommunications Corporation v. Pacific Bell Telephone Company, *et al.*, FCC 93-70 (released February 8, 1993) (*MCI Damages Order*).

[6] *MCI Liability Order*, 5 FCC Rcd at 217-218; *MCI Damages Order* at paras. 2-3.

4. Following the divestiture of the former Bell system and the concurrent development of the access charge system,[7] the Commission prescribed a rate of return system for all eight entities that emerged after divestiture (i.e., AT&T and the seven Regional Bell Holding Companies) and approximately 1400 other local exchange carriers as well. In a broad rulemaking proceeding, the Commission adopted: (1) methodologies to be used to prescribe maximum rates of return; (2) procedures for represcribing rates of return on a regular basis; (3) a system of monitoring carriers' earnings; and (4) a requirement that overearnings be refunded, either directly to those who had paid rates that produced the overearnings, or pursuant to automatic, prospective adjustments to tariff rates.[8] For the two-year time period at issue in the instant complaints, January 1, 1987 through December 31, 1988, local exchange carriers, including the defendants, were required to file rates calculated to earn a 12 percent rate of return for overall interstate access.[9] In accordance with the Commission's "buffer" policy, carriers were given notice that 12.25 percent would be the maximum allowable rate of return on overall interstate earnings and that 12.40 percent would be the maximum allowable rate of return for any access service category.[10] The buffer[11] would be used to determine whether the prescription had been violated.[12]

5. In January 1988, the U.S. Court of Appeals for the District of Columbia Circuit set aside the automatic refund mechanism as arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce."[13] The court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate of return prescription."[14]

6. In February 1988, MCI filed formal complaints against a number of local exchange carriers, including the defendants in the instant proceedings, alleging violations of the Commission's rate of return prescription for the October 1, 1985 through December 31, 1986 monitoring period and requesting monetary damages. Telesphere filed similar complaints in September 1989, also seeking damages for alleged rate of return prescription violations for the initial 1985-1986 monitoring period. During the same time period, numerous similar complaints were filed by other interstate access customers alleging rate of return prescription violations for the initial 15-month monitoring period.[15] In January 1990, the Commission released its *MCI Liability Order* granting MCI's complaints and directing MCI to file supplemental complaints for damages. In September 1990, Telesphere filed a second round of complaints against the defendant LECs alleging violations of the Commission's prescription for the January 1, 1987 through December 31, 1988 monitoring period. It is this second round of complaints that is the subject of these proceedings.[16] In January 1991, the Commission placed all pending rate of return complaints, including MCI's supplemental complaints for damages, in abeyance pending resolution of a related court remand in *Illinois Bell Tel. Co. v. FCC* .[17] Following the return of the proceedings to active status in December 1991 and the completion of discovery,[18] the parties to the various proceedings were required to submit initial briefs and reply briefs setting forth their respective claims and arguments.[19]

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[7] The Commission has prescribed for all local exchange carriers, including the defendants, a methodology known as the "access charge system," which carriers are required to follow in tariffing their interstate services. The system determines, *inter alia*, the carriers' overall rate structure and the allocation of costs within that structure, and was in effect during the period covered by the complaints. The access charge system is codified in Part 69 of the Commission's rules. *See* 47 C.F.R. § 69.1 *et seq.* (1988). These rules were developed in a proceeding that was the subject of numerous challenges on appeal. With a few exceptions not relevant to the instant complaint proceedings, these appeals were denied by the D.C. Circuit. *See NARUC v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985).

[8] *See* Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Carriers, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), (Phase I Order), *on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,033 (Apr. 1, 1986) (Phase I Reconsideration); *on further reconsideration*, 2 FCC Rcd 190 (1987). *See also*, Procedures and Methodologies to Establish Reporting Requirements, CC Docket No. 86-127, FCC 86-514 (released Dec. 3, 1986), 52 Fed. Reg. 273 (Jan.5 , 1987).

[9] *See* Authorized Rate of Return for the Interstate Access Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase III, FCC 86-354, 51 Fed. Reg. 32,920 (Sept. 17, 1986) (*Phase III Order*), *recon. denied*, 2 FCC Rcd 5636 (1987).

[10] 47 C.F.R. § 65.700.

[11] *See MCI Liability Order*, 5 FCC Rcd at 217:

> ... the Commission established both an authorized rate of return and a 'spread' or 'buffer' above that return for use in proceedings relating to the enforcement of the prescription. In other words, the authorized return would be employed in computing tariff rates; the spread, or buffer, would be used in combination with the authorized return 'to determine whether a rate of return prescription had been violated.' [footnote omitted]

[12] *See Phase I Order*, 50 Fed. Reg. at 41,352 (para. 21).

[13] *American Tel. & Tel. Co. v. FCC*, 836 F.2d 1386, 1390 (D.C. Cir. 1988) (*AT&T v. FCC*). For a detailed discussion of *AT&T v. FCC*, see *MCI Liability Order*, 5 FCC Rcd at 221-223.

[14] *Id.*, 836 F.2d at 1392.

[15] These additional complaints are being dealt with in separate Section 208 complaint proceedings.

[16] The Commission will resolve Telesphere's complaints covering the initial 1985-1986 monitoring period in a separate order.

[17] 911 F.2d 776 (D.C. Cir. 1990). *See* Telesphere Network, Inc. v. Chesapeake & Potomac Telephone Co., *et al.*, 6 FCC Rcd 653 (Com.Car.Bur. 1991). The Commission acted on the remand in October 1991. *See* Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, Decision on Remand, 7 FCC Rcd 296 (1991), *appeal docketed sub nom. Illinois Bell Telephone Co., et al. v. FCC*, No. 90-1020 (D.C. Cir. Jan. 11, 1991). On December 23, 1991, the Bureau released an order reactivating the instant proceedings. *See Order*, 6 FCC Rcd 7535 (Com.Car.Bur. 1991).

[18] *See* Telesphere Network, Inc., v. Chesapeake and Potomac Tel. Co., *et al.*, 7 FCC Rcd 3515 (Com.Car.Bur.1992) (*Discovery Order*); *see also* Telesphere Network, Inc. v. Chesapeake & Potomac Tel. Co., *et al.*, 7 FCC Rcd 5607 (Com.Car.Bur. 1992).

[19] In the instant proceedings, the complainant and the defendants all filed initial briefs pursuant to the schedules established by the Bureau on September 30, 1992. Each of the defendants also filed a reply to Telesphere's brief; however, for reasons

III. DISCUSSION

A. Liability For Damages

1. Contentions of the Parties

7. Telesphere alleges that the rates it paid for certain of the defendants' interstate access services during the period from January 1, 1987 through December 31, 1988 were unjust and unreasonable in violation of Section 201(b) of the Act.[20] Telesphere supports its allegations with evidence taken from reports filed with the Commission by the defendants for the monitoring period at issue that show that defendants achieved earnings in excess of the Commission's prescribed rate of return in one or more of the three interstate access categories established for the purpose of enforcing that rate of return prescription.[21]

8. Telesphere requests that the Commission declare that the defendant LECs' charges for the period from January 1, 1987 through December 31, 1988 are in violation of the rate of return prescription and Section 201(b) of the Act, and order the defendant LECs to pay damages to Telesphere equal to the difference between the amount actually paid by Telesphere for interstate access service during the period and the amount that Telesphere would have paid if the defendants' charges earned no more than the maximum allowable rate of return, plus interest.

9. Defendants advance a number of arguments to support their claim that Telesphere has failed to state a cause of action under the Act, most of which were full considered and disposed of in the *MCI Liability Order* and the *MCI Damages Order*.[22] The defendants make the threshold claim that earnings in excess of a rate of return prescription is not a violation of the Act or any valid Commission rule or order; and, even if such action could be considered a violation, it could occur only if the return was exceeded by the company overall.[23] To bolster this argument, the defendants claim that Telesphere's complaints are specifically precluded by the D.C. Circuit's decision in *AT&T v. FCC* and a later decision by the U.S. Court of Appeals for the Sixth Circuit in *Ohio Bell Tel. Co. v. FCC*.[24] The Ameritech Companies, for example, contend that renaming what amounts to a "refund" as a "damage award" does not cure the deficiencies the court found with a procedure which effectively requires the automatic refund of carrier overearnings but does not permit carriers to recoup underearnings.[25] The defendants argue that consistent with *AT&T v. FCC*, the Commission must consider underearnings in determining whether particular overearnings are in violation of the Act.[26] The defendants maintain that to the extent that their earnings for overall interstate access service did not exceed the allowed 12.25 percent, there can be no violation of the Act regardless of earnings realized in individual interstate access categories.[27] The defendants add that *Ohio Bell*, issued after the release of the *MCI Liability Order*, reaffirms the proposition established in *AT&T v. FCC* that the Commission cannot award damages for carrier earnings without allowing the carrier to re-coup or off-set underearnings.[28] Defendants argue that these propositions are not confined to the Commission's ratemaking activities under Sections 204-205 of the Act[29] but are equally applicable when the Commission decides private complaints for damages under Section 208 of the Act.

10. Defendants also argue that any Commission order requiring a carrier to make refunds solely because the carrier has exceeded the authorized rate of return would constitute unlawful retroactive ratemaking.[30] The defendants argue that rates charged in conformity with a

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neither stated by Telesphere nor apparent from the record, Telesphere did not file a reply or otherwise respond to any of the defendants' initial briefs.

[20] The defendants include: Indiana Bell Telephone Company (Indiana Bell), Michigan Bell Telephone Company (Michigan Bell), and Ohio Bell Telephone Company (Ohio Bell) (sometimes collectively referred to as the "Ameritech Companies"); and Southwestern Bell Telephone Company (SW Bell).

[21] The interstate access service categories are special access, common line, and switched traffic sensitive. *See* 47 C.F.R. § 65.702 (1990). The monitoring reports filed by the various defendants recite that for the period January 1, 1987 through December 31, 1988, Indiana Bell earned a return of 14.81 percent in the switched access category; Michigan Bell earned a return of 15.09 percent in the switched access category; Ohio Bell earned a return of 12.72 percent in the switched traffic sensitive category; and SW Bell earned returns in the switched traffic sensitive category of 16.27 percent in Kansas and 12.43 percent in its remaining territories and earned a return in the special access category of 12.76 percent.

[22] The arguments and claims made by the various defendants are, for the most part identical in their essentials. For convenience, we refer to the defendants' arguments as if they were part of the same pleading. To the extent that individual defendants make unique or separate arguments, we will address them accordingly.

[23] *See, e.g.*, Ameritech Companies Br. at 6-13; SW Bell Br. at 2-7.

[24] 949 F.2d 864 (6th Cir. 1991) (*Ohio Bell*). In *AT&T v. FCC*, the court invalidated the Commission's procedure to enforce its rate of return prescriptions through automatic refunds of carrier overearnings to customers. In *Ohio Bell*, the court, relying on the D.C. Circuit's decision in *AT&T v. FCC*, vacated a Commission order which had directed refunds of LEC earnings in excess of the authorized rate of return for the special access category over a period of years in the context of a strategic pricing investigation. *Ohio Bell*, 949 F.2d at 874. The Sixth Circuit placed considerable weight on the statement in *AT&T v. FCC* indicating that the Commission viewed its rate of return prescription as both minimum and a maximum ceilings on carrier earnings. 949 F.2d at 878, citing *AT&T v. FCC*, 836 F.2d at 1390. The Commission had since clarified, however, that it does not view a rate of return prescription as both a maximum and a minimum:

> [o]ur accumulated experience with rate of return prescriptions, and our review of the cost of capital evidence in this proceeding, convince us that there is no such point. * * * We believe there is a substantial gap between an earnings level that is fully adequate to assure attraction of capital on favorable terms, and an earnings level which, if sustained over time, would be confiscatory.

In the Matter of Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, 5 FCC Rcd 7507, 7532 (1990), *appeal docketed sub nom. Illinois Bell Tel. Co., v. FCC*, No. 90-1020 (Jan. 11, 1991).

[25] Ameritech Companies Br. at 9.

[26] *See* SW Bell Br. at 3-6; Ameritech Companies Br. at 9-10.

[27] *See, e.g.*, Ameritech Companies Br. at 6, 11-12.

[28] *Id.* at 22-23; SW Bell Br. 5-7.

[29] 47 U.S.C. §§ 204-205.

[30] *See, e.g.*, SW Bell at 6. The defendants argue specifically that under a recent Court decision, *Illinois Bell Tel. Co. v. FCC*, 966 F.2d 1478 (D.C. Cir. 1992), (*Illinois Bell*), the Commission may only engage in prospective ratemaking when the investigative

lawfully filed tariff cannot then be found to be unjust and unreasonable merely because they later proved to be too profitable.[31]

11. The Ameritech Companies contend that the rates at issue were prescribed by the Commission and cannot be subject to refunds or damage claims.[32]

12. Each of the defendants argues that all of Telesphere's claims are barred by Section 415 of the Act, which establishes a two-year statute of limitations on the filing of complaints.[33] According to the defendants, Section 415 bars the recovery of any damages if sought more than two years after the occurrence of any overearnings, in this case, thus barring all recovery sought after December 31, 1988.[34]

2. Discussion

13. We have carefully examined the record before us and conclude that the defendants, all of whom were defendants in the MCI complaint proceedings, have cited no facts and have made no arguments here that would warrant a ruling contrary to the *MCI Orders*.

14. *Failure to State a Cause of Action:* In the *MCI Liability Order*, we rejected identical claims made by the same defendants and held that *AT&T v. FCC* establishes no precedent that bars an individual complainant from seeking a remedy under Section 208 of the Act for damages based on a carrier's reported overearnings.[35] Specifically, we stated that

> we are not persuaded by defendants' claims that earning in excess of a prescribed rate of return does not violate that Act or, if it does, that the Commission *is required* to take a carrier's underearnings as well as its overearnings into account in determining whether a violation has occurred.
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> * * * * * * * *
>
> We find that a valid prescription bound the defendants to a maximum earnings limitation, and the defendants admit that they earned in excess of the amount during the period in question.[36]

We found further that *AT&T v. FCC* did not govern Section 208 complaint proceedings. The Commission has the authority to order a carrier to pay damages if a complainant meets the burden of establishing both a violation of the Act and the actual injury.[37]

15. In addition, we have previously held that enforcement of a rate of return prescription is not retroactive ratemaking because the obligation being enforced was set prospectively when the prescription was adopted.[38] Defendants have not persuaded us to alter our decision. We have also rejected the contention that rates charged in conformity with a lawfully filed tariff cannot be unjust and unreasonable.[39] As we stated in the *MCI Liability Order*, "legally effective, carrier-initiated tariffs can always be challenged as unreasonable and unlawful.[40] The issue raised by these complaints is not the lawfulness of high profits in the abstract, but the lawfulness of profits in excess of a prescription. Accordingly we hold that, taking into account the buffer, profits in excess of a prescription are unjust and unreasonable.

16. *AT&T v. FCC* and *Ohio Bell:* We disagree with the defendants' claim that *AT&T v. FCC* and *Ohio Bell* compel us to dismiss Telesphere's complaints. As we emphasized in the *MCI Liability Order* and reaffirmed in the *MCI Damages Order*, automatic refunds and refunds ordered under Section 204 of the Act are different from individual actions for damages under Section 208. Unlike the automatic refund mechanism in *AT&T v. FCC* or the refund procedure in *Ohio Bell*, both of which resulted from rulemaking proceedings initiated at the Commission's discretion, individual actions for damages under Section 208 are initiated by private parties seeking damages for injuries to themselves; those private parties have the burden of establishing both a violation of the Act and actual injury.[41] The courts in *AT&T v. FCC* and *Ohio Bell* did not discuss private complaints for damages; they did not invalidate private actions for damages; and their holdings are not applicable to the different separately authorized complaint procedure set forth in Sections 206-209. Accordingly, those decisions do not require us to depart from our holding in the *MCI Liability Order* that defendants have violated the Act by earning in excess of a valid rate of return prescription, thereby making their rates unjust and unreasonable under Section 201 of the Act and themselves liable for damages to the extent a complainant/customer can establish that it was damaged as a result of the violation.[42]

17. *Rates Prescribed by the Commission.* The Ameritech Companies' argument that the complaints are barred because the rates in effect during the period in question were prescribed by the Commission was discussed at length and rejected in the *MCI Liability Order* and requires no further

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and accounting requirements of § 204(a) have not been met. We reject defendant's claim that the decision in *Illinois Bell* somehow leaves the Commission only with Section 205 authority in the face of a violation of our rate of return prescription. As we explained in the *MCI Damages Order*, *Illinois Bell* addresses the Commission's authority under Section 204, not Section 208. *See MCI Damages Order* at para. 27. The defendants' claim that the *Illinois Bell* decision deprives the Commission of authority to award damages for violations of a valid rate of return prescription has no merit.

[31] *See, e.g.*, Ameritech Companies Br. at 13-16.

[32] Ameritech Companies Br. at 13-14.

[33] Section 415 provides, in pertinent part, that "[a]ll complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after...." 47 U.S.C. § 415(b) (1982). The term "overcharges" is defined in Section 415 "to mean charges for services in excess of those applicable thereto under the schedules of charges lawfully on file with the Commission." 47 U.S.C. § 415(g) (1982).

[34] *See, e.g.*, SW Bell Br. at 7-9; Ameritech Companies Br. at 16-17.

[35] *MCI Liability Order*, 5 FCC Rcd at 222-23.

[36] *MCI Liability Order*, 5 FCC Rcd at 223 (emphasis in the original).

[37] *Id.* at 222-23.

[38] *Id.* at 222.

[39] *Id.*

[40] *Id.* at 222, quoting *Arizona Grocery v. Atchison, T & S.F.R. Co.*, 284 U.S. 370, 384 (1932).

[41] *See MCI Liability Order*, 5 FCC Rcd at 222-23, para. 55.

[42] *Id.* at 226, para. 86.

discussion here.[43] The Ameritech Companies have raised no new issues or arguments that would persuade us to depart from our holdings.

18. *Statute of Limitations:* We held in the *MCI Liability Order* that the date a carrier files its final rate of return monitoring report is dispositive with regard to the date a complainant discovers the right or wrong or the facts on which such knowledge is chargeable as a matter of law.[44] Defendants have made no argument that persuades us to alter this determination. Accordingly, Section 415 does not bar Telesphere's complaints.

B. Damages and Interest Claims

19. Telesphere's damages claims rest primarily on the contention that the proper measure of damages it incurred as a result of the defendants' rate of return prescription violations is the difference between the amounts it actually paid the defendants for interstate access services during the October 1, 1985 through December 31, 1986 monitoring period and the amount it would have paid if the defendants' rates produced earnings that did not exceed the Commission's prescription. The defendants, however, have raised a number of challenges to Telesphere's damages claims, including a number of arguments that were previously considered and rejected by the Commission in the *MCI Liability Order* and the *MCI Damages Order*. We address the parties' contentions below.

1. Damages

a. Contentions of the Parties

20. As referenced above, Telesphere's damages claims rest primarily on the contention that the proper measure of the damages it incurred as a result of defendants' violations is the difference between the amount it actually paid defendants for interstate access services during the January 1, 1987 through December 31, 1988 period and the amount it would have paid if the defendants' rates had produced earnings that did not exceed the Commission's prescribed rate of return.[45] In addition, Telesphere argues that it is entitled to interest on the damages amounts. In the *Discovery Order*, the Bureau stated that it tended to agree, in principle, that a possible measure of the damages stemming from defendants' rate of return violations could be that difference.[46] The Bureau was not persuaded on the record before it, however, that a damages determination based solely on such a measure necessarily reflected actual damages incurred by Telesphere.[47] The defendants were invited to submit evidence that could serve to mitigate or otherwise reduce Telesphere's damages claims. Specifically, the Bureau stated that evidence demonstrating that Telesphere's share of excessive earnings realized in a particular access category by a defendant could be offset or otherwise reduced due to facts and circumstances surrounding Telesphere purchase of other interstate access services from such defendant for the relevant monitoring period might be relevant.[48]

21. In its brief, Telesphere does not state or otherwise identify the specific amount of damages it seeks from any of the defendants. Instead, it represents, without qualification or amplification, that the damage amounts are set forth in defendants' responses to interrogatories that requested the defendants to perform damages computations in accordance with the stated measure of damages. Applying the measure of damages advocated by Telesphere, and based on information provided by the defendants, Telesphere seeks to recover payments made by Telesphere that contributed to defendants' overearnings in the switched traffic sensitive access service category and/or special access category, exclusive of interest, as follows: Indiana Bell - $7,782; Michigan Bell - $6,311; Ohio Bell - $1,323; and SW Bell - $24,536 (switched access) and $15,177 (special access) for a total of $39,713.These amounts were all derived by the respective defendants and represent the difference in the amounts defendants charged Telesphere for switched traffic-sensitive access services and the amount that would have been charged had the defendants' switched traffic-sensitive access rates produced earnings at the Commission's prescribed level.

22. The defendants challenge Telesphere's damages claims on a number of grounds, raising several arguments that were previously considered and rejected by the Commission in the *MCI Liability Order* and the *MCI Damages Order*. Defendants contend that by simply basing its damages claims on a calculation of Telesphere's prorated share of category-level overearnings, Telesphere asks the Commission to award it damages in the same amounts it would have received under the automatic refund rule invalidated by the court in *AT&T v. FCC*.[49] The defendants maintain that such a result is expressly precluded by *AT&T v. FCC* as well as the court's decision in *Ohio Bell*. A number of the defendants add that the decision of the court in *Illinois Bell* also establishes that the Commission has no authority to award refunds if it has not first suspended the applicable

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[43] *See MCI Liability Order*, 5 FCC Rcd at 223-224.

[44] In the *MCI Liability Order* we stated:

> the defendants filed the rate of return monitoring reports which...were developed by the Commission for several purposes, including making information about carrier earnings public[ly] available. Moreover, the monitoring reports relied on by MCI in its complaints were specifically designated by the Commission as a "final" and conclusively binding determination of a carrier's earnings.

5 FCC Rcd at 225. We note further that, we have held that Section 415(e) is inapplicable to the type of complaints we deal with here. Section 415(e) concerns a carrier's liability to its customers for failure to transmit a message in accordance with its common carrier obligations. The instant complaints deal with the lawfulness of defendants' rates, not defendants' transmissions or obligations to transmit messages properly. *See MCI Reconsideration Order*, 5 FCC Rcd at 3464.

[45] Telesphere Brief at 2, citing *Louisville & Nashville R. Co. v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925); *Southern Pacific Co. v. Darnell-Taenzer Co.*, 245 U.S. 531 (1918); *Adams v. Mills*, 286 U.S. 397 (1932); *Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 920 (1981).

[46] *Discovery Order*, 7 FCC Rcd at 3516, para. 16.

[47] *Id.*

[48] *Id.*

[49] *See, e.g.*, Ameritech Companies Br. at 13-16. The defendants contend that *Ohio Bell* makes clear that it was the end result of the automatic refund mechanism, not the mechanism itself, that was unlawful.

rates under Section 204 of the Act.[50] These defendants argue that because the Commission never issued an accounting order pursuant to Section 204, the Commission is without authority to order refunds of those rates, regardless of whether it labels them "refunds" or "damages."[51]

23. Defendants next contend that, even if *AT&T v. FCC* and *Ohio Bell* do not preclude an award of damages, Telesphere's damages claims still fail because Telesphere's complaints do not establish a valid cause of action. According to defendants, to pursue a damages claim, Telesphere must first show that the defendants charged unjust and unreasonable rates for interstate access services during the period in question, not that defendants' rates produced excessive returns in individual service categories.[52] Moreover, defendants argue, Section 206 of the Act[53] requires Telesphere to prove injury, causation, and the amount of damages in addition to establishing a violation of the Act.[54] Defendants maintain that by simply referencing defendants' earned rates of return for individual access service categories, Telesphere has not only failed to allege any facts that would establish that defendants' rates were unjust and unreasonable during the period in question but has also failed to show that it sustained actual damage as a result of those rates.[55]

24. The defendants further contend that Telesphere's claims for damages are flawed because Telesphere simply assumes that lower rates would have produced lower earnings and offers no probative evidence to show what a reasonable rate would have been or to otherwise support its damages claims.[56] The defendants claim, in effect, that Telesphere would receive a windfall if it has passed the "overcharges" on to its customers and is now awarded damages.[57] The Ameritech Companies argue that had its access charges to Telesphere been lower in 1987-1988, it is almost certain that Telesphere's rates to its customers would have been lower.[58]

25. Finally, the defendants argue that even if the Commission determines that damages are lawful and appropriate, any damages award to Telesphere based on overearnings must be reduced to the extent that Telesphere purchased services from defendants in other access categories that produced underearnings. The Ameritech Companies, Indiana Bell, Michigan Bell and Ohio Bell, submitted information purporting to show that, on a category-by-category basis, their underearnings vis-a-vis Telesphere for the 1987-1988 monitoring period totalled $11,778, $6,897, and $3,470, respectively,[59] well over the amounts claimed by Telesphere as damages from each of these defendants. SW Bell has submitted information in which it indicates no offsets attributable to Telesphere's 1987-1988 access service purchases.[60] SW Bell contends nevertheless that the Commission should take into account Telesphere's purchase of access services from SW Bell in the initial 1985-1986 monitoring period in assessing Telesphere's damages claims.[61] SW Bell argues that to the extent that Telesphere benefitted from low rates during that initial period, its damages should be reduced accordingly.[62] The defendants maintain that without taking into account substantial benefits realized by Telesphere by purchasing services at unreasonably low rates, Telesphere would receive a windfall profit that would be inconsistent with sound principles of equity.

26. For its part, Telesphere does not dispute the offset amounts claimed by the defendants or otherwise challenge their offset claims.

b. Discussion

27. *AT&T v. FCC and Ohio Bell:* The defendants' claims that the holdings in *AT&T v. FCC* and *Ohio Bell* control these proceedings and bar an award of damages to Telesphere are without merit for the reasons stated in both the *MCI Liability Order* and the *MCI Damages Order*. In the liability section above, we again emphasized that the court in *AT&T v. FCC* explicitly acknowledged the Commission's authority to order a carrier to disgorge earnings in excess of a rate of return prescription,[63] finding only the remedy component of the Commission's rate of return prescription (the automatic refund mechanism) to be un-

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[50] 966 F.2d at 1481.

[51] *See, e.g.*, Ameritech Companies Br. at 21.

[52] The defendants argue that Telesphere must specify an identifiable rate that Telesphere paid that was too high or too low. *See, e.g.*, Ameritech Companies Br. at 11-13. These defendants cite to a 1970 U.S. Court of Appeals decision to support the claim that where retroactive relief is ordered for rates paid pursuant to a tariff that is subsequently found unjust and unreasonable, the Commission must determine what a just and reasonable rate is. *Id.*, citing to *Middlewest Motor Freight Bureau v. United States*, 433 F.2d 212, 232 (8th Cir. 1970) (*Middlewest*), *cert. denied*, 402 U.S. 999 (1971). As we determined in the *MCI Damages Order*, the defendants' reliance on *Middlewest* is misplaced. *MCI Damages Order* at n.56.

[53] 47 U.S.C. § 206.

[54] *See, e.g.*, SW Bell Br. at 5-6.

[55] *See, e.g.*, Ameritech Companies Br. at 18-20; SW Bell Br. at 3. The defendants contend that the principle that Telesphere must still prove it was damaged and in what amount was established by the Supreme Court in *Southern Ry. Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 454-55 (1979) (*Seaboard*), in construing relevant sections of the Interstate Commerce Act. The Court stated:

> [O]ur sole concern is the Commission's decision not to investigate under § 15(8)(a) [204], a decision that has only two final consequences. First, the burden of proof with regard to *reasonableness* is placed on the shipper under § 13(1) [208] rather than on the carrier, who would have borne it in a § 15(8)(a) [204] proceeding. (With respect to all other aspects of lawfulness, however, the burden is borne by the shipper in both proceedings.) Second, the shipper's relief, if unlawfulness is proved, is limited under § 13(1) [208] to actual damages rather than the full refund of overcharges available under § 15(8)(a) [204].

The defendants contend that this ruling has been found applicable to proceedings under the Communications Act. *See Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221, 1235 n.35 (D.C. Cir. 1980) (*ARINC*), *cert. denied*, 451 U.S. 920 (1981). Here too, as we determined in the *MCI Damages Order*, the defendants' reliance on case precedent is misplaced. *MCI Damages Order* at n.59.

[56] *See, e.g.*, SW Bell Br. at 5-6.

[57] *See, e.g.*, SW Bell Br. at 5-7.

[58] Ameritech Companies Br. at 19-20.

[59] *See* The Ameritech Companies' Answers to Complainant's Interrogatories, filed Sept. 10, 1992.

[60] *See* SW Bell's Response to Complainant's Interrogatories, filed September 14, 1992.

[61] SW Bell Br. at 6-8.

[62] *Id.*

[63] *AT&T v. FCC*, 836 F.2d at 1392 ("Thus, as we previously

lawful.[64] More to the point, we emphasized that "the [*AT&T v. FCC*] opinion does not address Section 208 complaint proceedings nor purport to alter the statutory scheme of the Act or the remedies Congress established therein."[65] Similarly, as we stated in the *MCI Damages Order*, the *Ohio Bell* decision does not expand upon *AT&T v. FCC* and does not address the Commission's authority to award damages in private complaint actions under Section 208 of the Act.[66]

28. *Section 201(b) of the Act:* We turn now to the defendants' contention that Telesphere's damages claims must be dismissed because Telesphere has failed to prove defendants' rates were unjust and unreasonable within the meaning of Section 201(b) of the Act. In the liability section above, we held that the complainant met its burden of proof by establishing that the defendants violated our rate of return prescription.[67] Accordingly, the question before us now is not whether defendants' rates were unjust and unreasonable; rather the questions now are whether the complainant suffered any measurable damage as a consequence of paying rates previously determined by the Commission to be unlawful under Section 201(b).

29. The defendants claim that even if Telesphere has sustained its burden and shown that defendants' rates were unjust and unreasonable, its damages claims must still fail because judicial precedent compels Telesphere to establish what a just and reasonable rate would have been as a prerequisite to recovering damages is also unavailing. This argument was previously considered and rejected in the *MCI Damages Order*. We emphasized in that decision the Commission's authority to prescribe and enforce carriers' rates of return.[68] We also pointed out that the issue in these rate of return complaint proceedings is not whether individual rates are unlawful, but whether cumulative rates that produced earnings over and above a prescribed rate of return are unjust and unreasonable.[69] Accordingly, we held that the Bureau had properly determined in the *Discovery Order* that a proper starting point for assessing damages based on violations of a rate of return prescription is to look at the difference between the amount complainant paid for defendants' interstate access services and the amount it would have paid if defendants had charged rates that produced returns within the Commission's prescribed levels.[70] Telesphere has shown that it purchased services from defendants at rates that produced earnings over and above the defendants' prescribed levels. We find this showing to be a proper starting point for assessing the damage to Telesphere suffered as a result of paying defendants' rates that produced such earnings.

30. *Damages and Offsets:* The defendants' arguments are devoted primarily to attempting to persuade the Commission that Telesphere's damages claims are really claims for restitution or refunds governed by equitable or public policy considerations. These considerations, according to defendants, militate against any award of damages to Telesphere based on excessive earnings. The defendants argue, in effect, that the damages Telesphere seeks are equivalent to refunds that would have been required under the refund mechanism invalidated by the court in *AT&T v. FCC*. We do not agree. We are concerned here with determining whether a particular customer, which has availed itself of a statutory complaint remedy under Title II of the Act, has sustained any measurable damage that can be traced to defendants' violations of the Act. Although a damages award under Section 208 of the Act might well be equal or substantially similar to a refund ordered under Section 204 of the Act,[71] this does not transform a private complaint action into a public enforcement proceeding subject to broad public interest considerations.

31. Nor can we accept the defendants' related claim that we should require Telesphere to flow through any damages it may receive to its end user customers. Sections 206-209 of the Act give private parties the right to file complaints challenging the acts or omissions of carriers and to recover monetary damages resulting from such acts or omissions. Complainants, however, are charged, as Telesphere is in the instant case, with the burden of establishing violations of the Act or Commission rule or order and the amount or extent of damage suffered as a consequence of such violations. Accepting defendants' flow through argument would, in effect, transform Telesphere's complaints into class action suits on behalf of its customers, a result neither expressly contemplated by nor consistent with the private remedy created under Sections 206-209 of the Act.

32. We do find, however, that certain of the defendants have made persuasive claims for offsets. At the outset, we find it significant that Telesphere elected not to respond to the defendants' offset claims. Given the clear discovery and briefing guidelines and schedules established by the Bureau, we can reasonably conclude that Telesphere does not dispute defendants' claim that its damages should be reduced to the extent that Telesphere purchased interstate access services from the defendants at rates that produced earnings below the prescribed levels. In this regard, the Ameritech Companies have shown that the damages Telesphere seeks from these defendants are completely offset by underearnings attributable to Telesphere purchases of common line and special access services during the

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have concluded, the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate of return prescription.").

[64] Indeed, the court in *Ohio Bell* recognized the continuing efficacy of our rate of return framework. *See* 949 F.2d at 868.

[65] *MCI Liability Order*, 5 FCC Rcd at 223, para. 56.

[66] *MCI Damages Order* at para. 14.

[67] In the *MCI Liability Order*, we held that the complainant therein could prove that defendants' rates were unjust and unreasonable by proving that the defendants violated our rate of return prescription. *See MCI Liability Order*, 5 FCC Rcd at 226.

[68] For a full discussion of the Commission's authority to prescribe and enforce carriers' rates of return, *see MCI Liability Order*, 5 FCC Rcd 222-223.

[69] *MCI Damages Order* at para. 29.

[70] *Id.*

[71] *See Seaboard*, 442 U.S. 444, 455, n.8:

> If a shipper proves a rate is unreasonable and that he was damaged in the full amount he was overcharged, the outcome of a § 13(1) [§ 208] proceeding will be no dif-

period covered by the complaint. Accordingly, we conclude that Telesphere has failed to sustain any damages claim against these defendants.[72]

33. With respect to SW Bell, the record establishes that SW Bell's overearnings in the switched traffic sensitive and special access categories total $39,713. SW Bell has made no persuasive showing that it is entitled to offsets against this amount. It has provided no support or rationale for its contention that we should take into account earning levels realized outside the relevant 1987-1988 monitoring period in assessing Telesphere's damages claims. Therefore, we award Telesphere damages from SW Bell in the amount of $39,713. We address Telesphere's claims for interest on this amount in the sections below.

2. Interest on Damages Awards

a. Contentions of the Parties

34. SW Bell claims that Telesphere is not entitled to prejudgment interest should the Commission award damages to Telesphere.[73] The defendant grounds its claim on the contention that the amount of damages has been sharply disputed in these proceedings.[74] The defendant further contends that interest would penalize them even though it has not been accused of deliberate wrongdoing. Moreover, the defendant contends, interest is not necessary to make Telesphere whole.

35. Telesphere simply contends that it is entitled to prejudgment interest in connection with any ultimate damages award. Telesphere does not, however, specify an appropriate interest rate or otherwise attempt to compute interest on its claimed damages.

b. Discussion

36. In deciding whether to award interest in a particular common carrier complaint case we are generally guided by federal court practice, where the award of prejudgment interest ". . . is a matter left to the sound discretion of the trial court."[75] The award of interest in a common carrier complaint case is thus guided by considerations of fairness. Applying this standard, we are persuaded that an award of interest is appropriate in these cases. Telesphere was effectively deprived of the use of the excessive amounts it paid defendant as a result of its unlawful rates while the defendant, on the other hand, enjoyed the beneficial use for a substantial period of time of funds to which Telesphere rightfully has a claim. We are persuaded that interest is required not only to effect a full and fair remedy for Telesphere, which paid rates higher than it would have paid had defendant earned within the prescribed level, but also to avoid any unjust enrichment of defendant stemming from their charging rates that we have determined to be unjust and unreasonable under Section 201(b) of the Act.[76] We conclude that interest should be computed at the IRS rate for tax refunds.[77] In addition, we find that interest should begin to accrue from January 1, 1989, the day after which the 1987-1988 monitoring period ended. At that point, SW Bell was subject to the earnings limitations of a new monitoring period. Accordingly, we award interest calculated at the IRS rate for tax refunds[78] from Southwestern Bell Telephone Company to Telesphere from January 1, 1989 until the date of full payment to Telesphere.

IV. CONCLUSION

37. We have carefully reviewed the extensive record before us and have found, to the extent indicated here, that complainant is entitled to an award of damages, plus accumulated interest on such damages, for SW Bell's violations of the Commission's rate of return prescription for the 1987-1988 monitoring period.

V. ORDERING CLAUSES

38. Accordingly, IT IS ORDERED, pursuant to Section 4(i), 4(j), 201, 206, 207, 208 and 209 of the Communications Act, as amended, 47 U.S.C. §§ 4(i), 4(j), 201, 206, 207, 208 and 209, that the above-captioned complaints filed by Telesphere ARE GRANTED to the extent indicated above and otherwise ARE DENIED.

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ferent than that of a § 15(8)(a) [§ 204] proceeding in which the carrier fails to establish the reasonableness of the rate.

[72] In the *MCI Liability Order*, we rejected claims by the defendant carriers that the Commission is required to take into account a carrier's interstate access underearnings as well as overearnings into account in determining whether a violation of the Act has occurred. 5 FCC Rcd at 222-223, citing *Nader v. FCC*, 520 F.2d 182, 201 (D.C. Cir. 1975). *See also, New England Tel. & Tel. Co. v. FCC*, 826 F.2d 1101 (D.C. Cir. 1987), *cert. denied*, 109 S. Ct. 1942 (1989). In the *MCI Damages Order*, however, we further concluded that it is appropriate to consider defendants' underearnings in assessing a complainant's damage or injury resulting from defendants' overearnings for a particular monitoring period. *MCI Damages Order* at paras. 39-40. We specifically rejected MCI's claims that this approach results in unlawful cross-subsidization. *Id.* at 40. The parties have provided no new arguments which would persuade us to alter our rulings.

[73] Because we conclude that the Ameritech Companies have successfully established offsets that negate Telesphere's damages claims, we do not reach the issue of interest as to these defendants.

[74] *See* SW Bell Br. at 9.

[75] *United States v. California Board of Equalization*, 650 F.2d 1127, 1132 (9th Cir. 1981), *aff'd*, 456 U.S. 901 (1982), *reh'g denied*, 456 U.S. 985 (1982).

[76] *See New England Tel. & Tel. Co. v. FCC*, 826 F.2d 1101, 1113 (D.C. Cir. 1987), *cert. denied*, 109 S. Ct. 1942 (1989) (carriers may reasonably be required "to pay full interest for earnings they had no right to retain in the first place.").

[77] We believe that the rationale adopted by the Commission for applying the IRS rate in pole attachment complaint proceedings under Section 204 of the Act, 47 U.S.C. § 204, is equally applicable here. In Teleprompter of Fairmont v. C&P of West Virginia, 79 FCC 2d 232 (1980), the Commission stated:

> As a matter of fairness, we believe that the rate of interest applied in a pole attachment complaint proceeding should be readily available, easily applied, and periodically revised to reflect changes in borrowing costs. In light of these considerations, we find the interest rate for federal tax refunds and additional tax payments suitable for use in this type of proceeding. This rate appears in a variety of easily obtained official and commercial publications, and is revised on a regular basis.

79 FCC 2d at 238 [footnote omitted].

[78] The applicable IRS rates are set forth in Appendix A.

39. IT IS FURTHER ORDERED that the Southwestern Bell Telephone Company SHALL PAY to Telesphere Network, Inc. the sum of $39,713 (thirty-nine thousand seven hundred thirteen) within 60 days after the release date of this Memorandum Opinion and Order.

40. IT IS FURTHER ORDERED that the Southwestern Bell Telephone Company SHALL PAY to Telesphere Network, Inc. interest on the damages awarded here at the IRS rates set forth in Appendix A from January 1, 1989 until the date full payment is made.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Effective Period	Rate	Internal Revenue Service Citation
01/01/87 - 03/31/87	8%	Rev.Rul. 146, 1986-2 C.B. 208
04/01/87 - 06/30/87	8%	Rev.Rul. 87-23, 1987-13 I.R.B. 46
07/01/87 - 09/30/87	8%	Rev.Rul. 87-62, 1987-29 I.R.B. 10
10/01/87 - 12/31/87	9%	Rev.Rul. 87-87, 1987-36 I.R.B. 8
01/01/88 - 03/31/88	10%	Rev.Rul. 87-131, 1987-50 I.R.B. 6
04/01/88 - 06/30/88	9%	Rev.Rul. 88-17, 1988-10 I.R.B. 6
07/01/88 - 09/30/88	9%	Rev.Rul. 88-50, 1988-25 I.R.B. 39
10/01/88 - 12/31/88	10%	Rev.Rul. 88-86, 1988-41 I.R.B. 1
01/01/89 - 03/31/89	10%	Rev.Rul. 88-105, 1988-51 I.R.B. 4
04/01/89 - 06/30/89	11%	Rev.Rul. 89-36, 1989-1 C.B. 309
07/01/89 - 09/30/89	11%	Rev.Rul. 89-69, 1989-1 C.B. 310
10/01/89 - 12/31/89	10%	Rev.Rul. 89-99, 1989-2 C.B. 256
01/01/90 - 03/31/90	10%	Rev.Rul. 89-125, 1989-2 C.B. 257
04/01/90 - 06/30/90	10%	Rev.Rul. 90-19, 1990-1 C.B. 186
07/01/90 - 09/30/90	10%	Rev.Rul. 90-47, 1990-1 C.B. 187
10/01/90 - 12/31/90	10%	Rev.Rul. 90-71, 1990-35 I.R.B. 4
01/01/91 - 03/31/91	10%	Rev.Rul. 90-94, 1990-46 I.R.B. 16
04/01/91 - 06/30/91	9%	Rev.Rul. 91-20, 1991-11 I.R.B. 1
07/01/91 - 09/30/91	9%	Rev.Rul. 91-33, 1991-21 I.R.B. 1
10/01/91 - 12/31/91	9%	Rev.Rul. 91-50, 1991-37 I.R.B. 1
01/01/92 - 03/31/92	8%	Rev.Rul. 91-65, 1991-51 I.R.B. 1
04/01/92 - 06/30/92	7%	Rev.Rul. 92-21, 1992-14 I.R.B. 14
07/01/92 - 09/30/92	7%	Rev.Rul. 92-44, 1992-24 I.R.B. 86
10/01/92 - 12/31/92	6%	Rev.Rul. 92-77, 1992-38 I.R.B. 12

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TRANSASIA COMMUNICATIONS, INC. File No. ITC-92-204

Application for Authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate facilities for the provision of common carrier services between the United States and the Philippines.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: February 16, 1993; Released: March 1, 1993

By the Chief, International Facilities Division:

1. The above captioned application, filed by Transasia Communications, Inc. (Transasia), requests authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate facilities for the provision of common carrier services between the United States and the Philippines. We placed the application on public notice on July 8, 1992, and we received no comments. We herein grant Transasia's application, subject to certain conditions.

2. Transasia is a nondominant communications carrier that states that it is providing its services in accordance with the Commission's *Competitive Common Carrier Rulemaking* (Docket No. 79-252, *First Report and Order*, 85 FCC 2d 1 (1981).[1] In its application, Transasia requests authority to lease 6 64-Kbps half-circuits from CICI d/b/a IDB[2] in an appropriate Intelsat Pacific Ocean Region satellite, with the matching half-circuits to be provided by Transasia's correspondent in the Philippines.[3] Transasia proposes to use the facilities for the purpose of providing common carrier services, including private line and switched voice service, between the United States and the Philippines and points beyond.[4]

3. Transasia's application, including information it subsequently provided to the Commission, indicates that Transasia intends to provide, in addition to private line service, what appears to be switched voice service between the United States and the Philippines over IBS circuits.[5] Transasia provides no evidence that it will not originate or terminate traffic from any entity in the United States or the Philippines that wishes to subscribe to its correspondent's service. Indeed, Transasia notes that its correspondent "has over a thousand (1,000) telephones and stations."[6] Transasia indicates that calls terminating in the United States through the public switched network will be made only to corporate affiliates of the customers in the Philippines,[7] but does not explain how it will ensure -- through, for example, technical restrictions or restrictions in its correspondent's tariff or contract -- that only such calls will utilize the public switched network. Furthermore, Transasia states that both Transasia and its correspondent will "collect from their respective customers and compensate each other on a per minute (6 seconds) or K-segment (data-bits) basis on traffic they send each other."[8] We cannot conclude on this basis that the service proposed by Transasia is solely a private line service.

4. To the extent that Transasia intends to terminate switched voice traffic in the United States over its leased half-circuits, it would be in violation of conditions in both IDB's and Comsat's tariffs for IBS service. Comsat's Tariff

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[1] Transasia has stated that it is solely owned by Arturo F. Campo, an American citizen, and that the business relationship between itself and its correspondent in the Philippines is defined in the signed operating agreement submitted to the Commission on July 24, 1992. *See* Letter, dated December 10, 1992, from Arturo F. Campo, President and Chief Executive Officer, Transasia, to George S. Li, Chief, International Facilities Division, Common Carrier Bureau, Federal Communications Commission.

[2] Transasia originally requested authority to lease capacity from both Comsat and IDB, but subsequently clarified that it intends to acquire only IBS circuits leased solely from IDB. *See* Letter, dated February 15, 1993, from Arturo F. Campo, President and Chief Executive Officer, Transasia, to George S. Li, Chief, International Facilities Division, Common Carrier Bureau, Federal Communications Commission (*February 15 Letter*).

[3] Transasia withdrew a request to lease capacity in the TPC-3/HAW-4/G-P-T cable system. *See* Letter, dated July 24, 1992, from Arturo F. Campo, President & Chief Executive Officer, Transasia Communications, Inc.

[4] In its application Transasia requests authority to acquire and operate facilities for the provision of common carrier services between the United States and the Philippines and points beyond. We note that should Transasia obtain any interest in facilities beyond the Philippines for the purpose of providing common carrier services, including private line service, between the United States and other foreign points, such action would constitute an extension of line under Section 214 of the Act. Therefore, under the provisions of the Commission's International Competitive Carrier decision, *International Competitive Carrier Policies*, 102 FCC 2d 812 (1985), *recon. denied* 60 R.R. 2d 1435 (1986), it would be necessary for Transasia to file additional applications for a certificate of public convenience and necessity under Section 214 to begin service to each additional country and for authority to acquire any facilities needed to provide service to such additional points.

[5] Pursuant to staff request, Transasia withdrew its request to provide switched voice service over the requested satellite circuit. *See* Letter, filed February 3, 1993, from Arturo F. Campo, President and Chief Executive Officer, Transasia, to George S. Li, Chief, International Facilities Division, Common Carrier Bureau, Federal Communications Commission.

[6] *See February 15 Letter.*

[7] *See February 15 Letter.*

[8] *See February 15 Letter.* International Message Telephone Service may be generally characterized as the transmission and reception of speech over the public switched network for which a charge is collected on a minimum charge per call or measured time basis. *See* Manual for Filing Section 43.61 Data in accordance with the FCC's Rules and Regulations, released July 22, 1992, at 9.

F.C.C. No. 103 states that "IBS ... capacity shall not be used for public switched telephony traffic."[9] Furthermore, IDB's Tariff F.C.C. No. 2 states that "The service may be used to transmit or receive communications of the customer or its users, or to provide service to the public in a manner consistent with the terms of this tariff, the policies and regulations of the FCC, Intelsat, Comsat..."[10] As noted above, we have insufficient information to determine whether Transasia's service offering will include public switched telephony traffic. In this context, we will not grant Transasia authority which might be in violation of applicable tariffs. However, we do not wish to impede Transasia's ability to provide service that is clearly in compliance with our rules and applicable tariffs and that will likely have pro-competitive consequences for the U.S.-Philippines telecommunication market. Therefore, we will grant Transasia's application to offer private line service[11] between the United States and the Philippines, on the condition that Transasia not interconnect its facilities to the U.S. public switched network until authorized to do so by the Commission.

5. Accordingly, IT IS ORDERED that application File No. ITC-92-204 IS GRANTED, and Transasia is authorized to:

a. lease from IDB International and operate six 64-Kbps satellite circuits between the Culver City, California earth station and an appropriate INTELSAT satellite over the Pacific Ocean, connecting with similar circuits between the satellite and an earth station in the Philippines furnished by Transasia's correspondent in the Philippines;

b. lease from IDB International and operate six 64-Kbps circuits in the Culver City, California earth station;

c. lease and operate appropriate connecting facilities between the Culver City earth station and Transasia's operating center in New York; and

d. use the leased facilities in a, b and c above to resell international private lines not interconnected to the public switched network for the provision of international private line services between the United States and the Philippines only.[12]

6. IT IS FURTHER ORDERED that neither Transasia nor any persons or companies directly or indirectly controlling or controlled by Transasia, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which Transasia or any persons or companies controlling or controlled by Transasia are parties.

7. Transasia shall file copies of any operating agreement entered into with its correspondent in the Philippines, including any terms of agreement between Transasia and its correspondent in the Philippines that have not been filed, with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. § 43.51, and in *Regulation of International Accounting Rates*, Phase II, First Report and Order, 57 Fed. Reg. 646 (1992) (to be codified at 47 C.F.R. § 43.51(a)(3)).

8. IT IS FURTHER ORDERED that this Order may be subject to future modification pursuant to the outcome of the *Phase II Third Further Notice* and any related proceedings.

9. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services Transasia seeks authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

10. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

11. IT IS FURTHER ORDERED that the applicant shall file publicly:

(a) a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. § 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61; or

(b) a copy of any contracts entered into with other carriers or a contract summary in accordance with Section 203 of the Communications Act, 47 U.S.C. § 203, and the *Interexchange Order*.[13]

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[9] *See* Comsat Tariff F.C.C. No. 103, Section 6.3.2.A.1; 6.3.2.B.1.

[10] *See* IDB Tariff F.C.C. No. 2, Section 3.2.1.

[11] We note that private line service may be generally defined as "the leasing of a dedicated channel of communications (leased circuit) for specified periods of time for the customer's use. Leased private line circuits are typically priced by bandwidth or capacity and other features such as conditioning." *See* Manual for Filing Section 43.61 Data in accordance with the FCC's Rules and Regulations, released July 22, 1992, at 10.

[12] The Commission has concluded that the public interest in cost-based international telecommunications services would be served by the encouragement of international resale, provided that steps were taken to ensure that such resale did not exacerbate the settlements deficit. The Commission, therefore, conditioned its resale policy by requiring U.S. carriers to permit resale of their international private lines only to those countries which afford equivalent resale opportunities. (*See Regulation of International Accounting Rates, CC Docket 90-337, Phase II, First Report and Order*, 7 FCC Rcd 559 (1992)). Subsequently, the Commission stated that the resale of international private lines for the provision of international private line services, as opposed to switched services, does not directly implicate the international settlements policy to the extent such lines are used only to carry non-switched traffic that is not subject to the international settlements process, and thus clarified that the equivalency requirement does not apply to the resale of international private lines for private line services. (*See Regulation of International Accounting Rates, CC Docket 90-337, Phase II Order on Reconsideration and Third Further Notice of Proposed Rulemaking* (*Phase II Third Further Notice*), 7 FCC Rcd 7927 (1992)).

[13] *See Competition in the Interstate Interexchange Marketplace*, 6 FCC Rcd 5880, 5902 (1991) (*Interexchange Order*).

12. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61.

13. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. § 63.10(b), for INTELSAT satellite circuits.

14. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION$

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMMUNICATIONS SATELLITE CORPORATION — File No. I-T-C-93-046

Application for authority to obtain units of utilization from INTELSAT and to establish channels of communications for the purpose of providing point-to-multipoint Datanet service between the United States mainland and the Commonwealth of Puerto Rico and between the U.S. mainland and the U.S. Virgin Islands on an Incidental Basis.

ORDER AND AUTHORIZATION

Adopted: February 19, 1993; Released: March 1, 1993

By the Chief, International Facilities Division:

1. The Commission has under consideration an application filed by Communications Satellite Corporation (Comsat) requesting authority pursuant to Section 214 of the Communications Act of 1934, as amended, to establish channels of communications via the INTELSAT Atlantic Ocean Region (AOR) satellite located at 325° E.L. to connect an American Telephone and Telegraph Company (AT&T) hub earth station in Roaring Creek, Pennsylvania and earth stations located in the Commonwealth of Puerto Rico (Puerto Rico) and the U.S. Virgin Islands for the provision of point-to-multipoint Datanet service as part of thirty-one station network encompassing the Latin American and Caribbean VSAT network of an AT&T customer. Comments in response to the application were filed by GTE Spacenet Corporation (GTE Spacenet).

2. In its application Comsat proposes to provide point-to-multipoint Datanet service to AT&T who has requirements for service between the U.S. mainland and various international points which Comsat is already authorized to serve and wishes to include Puerto Rico and the U.S. Virgin Islands as part of its international networks. Comsat notes that the majority of the traffic on the network, as well as the majority of points served, would be international. Since it is already authorized to provide the international Datanet service required by its customer, Comsat states that the addition of Puerto Rico and the U.S. Virgin Islands as part of this international network can be accomplished without leasing additional bandwidth capacity. Comsat states that it would serve no useful purpose to use separate satellite or earth station facilities just to transmit to two offshore domestic points associated with this international VSAT network. Moreover, Comsat argues that use of domestic satellites alone is not feasible since such satellites cannot provide coverage of South America and their coverage of Mexico and Central America is problematic at best. Comsat notes that only use of the INTELSAT system can provide a single viable satellite communications link for the proposed services.

3. In further support of its application, Comsat notes that under Article III(b)(i) of the INTELSAT Agreement, domestic public telecommunications services between areas separated by the high seas are considered on the same basis as international public telecommunications services.[1] Comsat states that communications between the U.S. mainland and Puerto Rico and the U.S. mainland and the U.S. Virgin Islands fall within this category. Comsat also notes that customers of separate satellite systems may use their facilities for "domestic communications that are reasonably related to use of the facilities for international communications."[2]

4. GTE Spacenet's comments do not oppose grant of the instant application since the service proposed by Comsat could not be furnished in its entirety via a domestic satellite. Therefore, GTE Spacenet supports grant of the application as a special circumstance where use of a U.S. domestic satellite would not be the most economical method of providing service to the domestic points in question. However, GTE takes issue with Comsat's reliance on Article III(b)(i) of the INTELSAT Agreement to justify a grant of its application. According to GTE, such an interpretation is inconsistent with long-standing Commission policy. GTE Spacenet argues that Article III(b)(i) was added as a special exception to meet specific requirements of a certain number of members of INTELSAT and was never intended to obligate member administrations to use international facilities for the provision of domestic service between areas separated by the high seas.

5. Upon consideration of the application and comments, we find that authorization of Comsat's application to establish channels of communications, based on the specific circumstances and representations presented in its application, will serve the present and future public convenience and necessity. Comsat states that service to Puerto Rico and the U.S. Virgin Islands will be provided on an incidental basis to a customer whose service requirements are primarily international. The Commission has previously recognized that, under such circumstances, the use of a single satellite is the most efficient means of providing service to both domestic and international points.

6. Under the Transborder policy, the Commission has recognized that the use of domestic satellites for the provision of certain international public telecommunications services on an incidental basis would serve the public interest.[3] In such instances, the Commission has held that

[1] Article III(b)(i) states that "domestic public telecommunications services between areas separated by areas not under the jurisdiction of the States concerned, or between areas separated by the high seas" shall be considered on the same basis as international public telecommunications services.

[2] Establishment of Separate Satellite Systems Providing International Communications, 6 R.R.2d 649, 667 (1986).

[3] Transborder Satellite Video Services, 88 FCC 2d 258 (1981); Satellite Business Systems, 88 FCC 2d 195 (1981); and American Satellite Company, 88 FCC 2d 178 (1981).

use of INTELSAT facilities to extend domestic networks to international locations within the footprint of a domestic satellite would be uneconomical and impractical because unnecessary duplication of facilities and a waste of the available radio spectrum would result.

7. The same principle is equally applicable here. The service Comsat proposes to provide to AT&T in the instant application is primarily international in nature and could not be provided in its entirety by domestic satellite facilities. Under these circumstances, use of an INTELSAT satellite for the limited domestic service proposed would be the most efficient and cost-effective means of providing service. Our finding that INTELSAT satellites may be used to provide domestic service on an incidental basis between the U.S. mainland and Puerto Rico and the U.S. Virgin Islands is limited to Comsat's provision of service to the specific offshore points referenced in its application and should not be construed as permitting the provision of purely domestic services via INTELSAT facilities.[4] Finally, our finding here is limited to the specific circumstances present and should not be construed as interpreting Article III(b)(i) to apply to such circumstances.

8. Accordingly, IT IS ORDERED that application File No. I-T-C-93-046 IS GRANTED and Comsat is authorized to provide to AT&T point-to-multi-point Datanet service between the U.S. mainland and Puerto Rico, and between the U.S. mainland and the U.S. Virgin Islands, on an incidental basis, and as part of an integrated international VSAT network offered by AT&T via the INTELSAT AOR satellite located at 325^0 E.L. and AT&T's earth station located in Roaring Creek, Pennsylvania.

9. IT IS FURTHER ORDERED that earth station operators in the U.S. offshore locations must have the requisite Title III authority to operate with the INTELSAT system.

10. This order is issued pursuant to Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4 (b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[4] The requirement that INTELSAT space segment be used for "incidental" service to offshore U.S. points does not apply to those U.S. offshore points which are not served by U.S. domestic satellites.

Before the
Federal Communications Commission
Washington, D.C. 20554

In Re

High Tech Communications of Iowa, Inc. — File No. 316MS0008

Notice of Apparent Liability for Forfeiture Penalty for Station KNKG445 in the Public Land Mobile Service at Tipton, Iowa

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: February 18, 1993; Released: March 1, 1993

By the Chief, Mobile Services Division:

1. On November 19, 1991, the Commission granted an authorization to High Tech Communications of Iowa, Inc. (High Tech) to operate on frequency 959.9375 MHz at Tipton, Iowa. The expiration date of the authorization was November 19, 1992. On December 18, 1992, High Tech filed FCC Form 489, Notification of Status of Facilities, requesting reinstatement. The FCC Form 489 included a statement notifying the Commission that construction had been completed and operation had commenced.

2. Section 22.9(b)(1) of the Commission's Rules states:

> *Notification of status of facilities.* (FCC Form 489). When construction has been completed in accordance with the radio station authorization, the licensee shall so notify the Commission using Form 489. Licensees can commence service the day Form 489 is placed in the mail to the FCC.

Therefore, because High Tech commenced operation without timely filing FCC Form 489 with the Commission, it is in apparent violation of Section 22.9(b)(1).

3. Section 503(b) of the Communications Act states in pertinent part:

> Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection, to have--
>
> (B) willfully or repeatedly failed to comply with any of the provisions of this chapter or of any rule, regulation, or order issued by the Commission under this chapter...shall be liable to the United States for a forfeiture penalty.

We find that High Tech's failure to file a Form 489 until December 18, 1992, constitutes willful and repeated conduct within the terms of the statute.[1]

4. Pursuant to our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991) *(Policy Statement), recon. denied*, 7 FCC Rcd 5339 (1992), *petition for review pending sub nom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992), the base forfeiture amount for failing to file required forms is $30,000. The forfeiture is being adjusted downward by $15,000 because failing to file an FCC Form 489 is a relatively minor violation, and by an additional $9,000 because High Tech voluntarily disclosed its failure to file the FCC Form 489. Consequently, a $6,000 forfeiture is assessed.

5. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. Section 503(b) and Section 1.80 of the Commission's Rules, 47 C.F.R. Sec. 1.80, IT IS ORDERED that High Tech Communications of Iowa, Inc. IS APPARENTLY LIABLE FOR A FORFEITURE in the amount of Six Thousand Dollars ($6,000) for willful and repeated violations of the aforementioned rule. The amount specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934, as amended.

6. Payment of the forfeiture may be made by mailing a check or similar instrument, noting on the payment the File Number of the above captioned proceeding, to the Commission within thirty (30) days of the release date of this order, payable to the order of the Federal Communications Commission to: Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482.

7. A copy of this Notice is being sent to High Tech Communications of Iowa, Inc., 3088 State Highway 27, Kendall Park, New Jersey 08824, by Certified Mail, Return Receipt Requested.

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[1] Section 312(f)(1) of the Communications Act provides:

> The term "willful", when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States.

This definition applies to Section 503(b) of the Communications Act. *See Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

Section 312(f)(2) of the Communications Act provides:

> The term "repeated", when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.

This definition applies to Section 503(b) as well. *See* H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 50-51 (1982).

FEDERAL COMMUNICATIONS COMMISSION

John Cimko
Chief, Mobile Service Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application

HHT/Estate of Robert D. Hanna — File No. 6902-CM-P-83

For Authority to Construct and Operate a Multichannel Multipoint Distribution Service station on the E-group channels at Lawton, Oklahoma

MEMORANDUM OPINION AND ORDER

Adopted: February 19, 1993; Released: March 1, 1993

By the Chief, Domestic Facilities Division:

1. *Introduction.* The above-referenced application of HHT/Estate of Robert D. Hanna (hereinafter referred to HHT) to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the E-group channels to serve Lawton, Oklahoma was selected for qualification review as the result of a Commission lottery held on October 31, 1986. Michael P. Russell (hereinafter referred to as Russell) filed a post-lottery Petition to Dismiss HHT's application on June 22, 1992.

2. *Petition to Deny.* Russell argues that HHT failed to prosecute its application and has made no serious attempt to cure deficiencies identified in Commission deficiency letters. Russell claims that deficiencies such as lack of site lease or lease option agreement, or current financial data compel dismissal of the application. We have treated Russell's Petition to Dismiss as a post-lottery Petition to Deny and for the following reasons, we deny the petition.

3. *Discussion.* The Commission Rules require that a post-lottery petition to deny an MMDS application must be filed within 30 days from the date of public notice announcing the lottery tentative selectee, as that date is defined in Sec. 1.4 of the Commission's Rules. *MMDS Lottery Order,* 57 Rad. Reg. 2d 943, 953 (1985). *See* 47 C.F.R. Secs. 1.824(c) and 21.30(a)(4). On November 4, 1986, the Commission announced that HHT was chosen as the tentative selectee for the E-group channels at Lawton, Oklahoma. *Public Notice,* Mimeo No. 0494 (November 4, 1986). Russell's petition was filed approximately six years after the due date prescribed by Section 21.30(a)(4). Therefore, Russell filed his petition well-beyond the permissible period for filing petitions to deny. Accordingly, the petition to deny is hereby denied as late-filed.

4. *Conclusion.* Based on the foregoing, IT IS ORDERED that the Petition to Deny filed by Michael P. Russell concerning the MMDS application of HHT/Estate of Robert D. Hanna at Lawton, Oklahoma IS HEREBY DENIED. This order is issued pursuant to 47 C.F.R. Sec 0.291, and is effective upon its release date. Petitions for reconsideration pursuant to 47 C.F.R. Sec. 1.106, or applications for review, pursuant to 47 C.F.R. Sec 1.115, may be filed within thirty (30) days of the date of public notice of this order. *See* 47 C.F.R. Sec 1.4 (b).

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Paul Communications, Inc. — File Nos. 11604-CM-P-83, 11622-CM-P-83

For Authority to Construct and Operate a Multichannel Multipoint Distribution Service station on the E-group channels at Altoona, Pennsylvania and Binghamton, New York

ORDER ON RECONSIDERATION

Adopted: February 19, 1993; Released: March 1, 1993

By the Chief, Domestic Facilities Division:

1. This matter concerns a petition for reconsideration of the dismissal by the Domestic Facilities Division (the Division) of the applications of Paul Communications (Paul) Inc., to construct and operate Multichannel Multipoint Distribution Service (MMDS) stations on the E-group channels at Altoona, Pennsylvania and Binghamton, New York and for reinstatement of the above-referenced applications. For the reasons discussed below, we deny the petition.

I. BACKGROUND AND CONTENTIONS

2. Paul's Altoona and Binghamton MMDS applications were selected for qualification review as the result of Commission lotteries. Subsequently, the Division initiated a qualification review of the applications pursuant to Section 21.32 of the Commission's Rules, 47 C.F.R. § 21.32. Upon examination, the applications were found to contain several deficiencies that precluded the staff from making a finding that Paul was legally, technically, financially, and otherwise qualified to be a licensee, and that grant of the applications would serve the public interest. Paul was notified, in writing, of these deficiencies[1] and provided an opportunity to cure them within thirty (30) days of the Commission's letters, dated September 24, 1986 and October 3, 1986.

3. Pursuant to Sections 21.13(c), 21.20(d) and 21.28(d) of the Commission's Rules, and by letters dated May 15, 1987 and May 29, 1987, the Division dismissed, without prejudice, Paul's applications for failure to comply in a timely manner with its request for information. The dismissal actions appeared on public notice May 27, 1987 and June 10, 1987.

4. On July 24, 1987, Paul filed the instant petition for reconsideration of the Division's dismissal actions. Paul maintains that reinstatement of the applications would be in the public interest because it has substantially complied with the staff's request for information by curing most of the outstanding deficiencies. Paul acknowledges that there was a delay in responding to the Division's deficiency letters, but states the delay was due to its heavy involvement in the press of other business which made it difficult to cure its applications.

II. DISCUSSION

5. Paul failed to file its petition for reconsideration in a timely manner. Section 405 of the Communications Act of 1934, as amended, 47 U.S.C. § 405 (1983), prescribes that petitions for reconsideration "must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of." Because the time period for filing petitions for reconsideration is prescribed by statute, the Commission may not ordinarily waive or extend the filing period. *Reuters Limited v. FCC*, 781 F.2d 946 (D.C. Cir. 1986)("...we conclude that the Commission acted beyond its lawful authority when it entertained the belated petition for reconsideration."); *Fortuna Systems Corp.*, 3 FCC Rcd 5122, 5123 (1988); *Metromedia, Inc.*, 56 FCC 2d 909 (1975). Due to Paul's failure to comply with this filing deadline, the petition for reconsideration is hereby dismissed.[2]

6. In view of the foregoing, dismissal of the applications for failure to comply with the Division's requests for information was proper, reconsideration of that action is not warranted, and reinstatement is not justified.

III. ORDERING CLAUSE

7. Accordingly, IT IS ORDERED that the petition for reconsideration filed by Paul Communications, Inc., for its MMDS applications at Altoona, Pennsylvania and Binghamton, New York IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

[1] The deficiencies cited were the absence of: (1) a signed lease or option to lease agreement, pursuant to 47 C.F.R. § 21.15(a); (2) current financial data, pursuant to 47 C.F.R. § 21.17(b); (3) non-affiliation statement, pursuant to 47 C.F.R. §§ 21.900, 21.903(b)(1) and 21.903(b)(2); (4) antenna structure heights and coordinates in agreement with FCC records; and (5) an analysis demonstrating that the proposed facility will not cause any harmful interference to existing co-channel or adjacent channel ITFS receiver locations.

[2] Although we are dismissing Paul's petition for reconsideration on procedural grounds, and need not reach the merits of the arguments made by the petitioner, we have reviewed and considered them in this proceeding.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Line of Site, Inc. File No. 7099-CM-P-83

For Authority to Construct
and Operate a Multichannel
Multipoint Distribution Service
station on the E-group channels at
Flagstaff, Arizona

ORDER ON RECONSIDERATION

Adopted: February 19, 1993; Released: March 1, 1993

By the Chief, Domestic Facilities Division:

1. This matter concerns a petition for reconsideration of the dismissal by the Domestic Facilities Division (the Division) of the application of Line of Site, Inc. (Line) to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the E-group channels at Flagstaff, Arizona and for reinstatement of the application. For the reasons discussed below, we deny the petition.

I. BACKGROUND AND CONTENTIONS

2. As the result of a Commission lottery, Line's application was selected for qualification review. Subsequently, the Division initiated a qualification review of the application, pursuant to Section 21.32 of the Commission's Rules, 47 C.F.R. § 21.32. Upon examination, the application was found to contain several deficiencies that precluded the staff from making a finding that Line was legally, technically, financially, and otherwise qualified to be a licensee, and that a grant of the application would serve the public interest. By letter dated March 31, 1988, Line was notified of these deficiencies[1] and provided an opportunity to cure them within thirty (30) days of the date of the letter.

3. Pursuant to Sections 21.13(c), 21.20(d) and 21.28(d) of the Commission's Rules, and by letter dated November 18, 1988 the Division dismissed, without prejudice, Line's application for failure to comply in a timely manner with its request for information. The dismissal action appeared on public notice December 7, 1988.

4. On December 16, 1988, Line filed the instant petition for reconsideration of the Division's dismissal action. Line maintains that reinstatement of the application would be in the public interest because it has substantially complied with the staff's request for information by curing most of the outstanding deficiencies.[2]

II. DISCUSSION

5. As of the date of the Division's deficiency letter, March 31, 1988 and almost nine months later, Line still had not submitted the information necessary for evaluation of its qualification to be an MMDS licensee. For example, Line had not submitted a lease, lease option agreement, or other "concrete evidence" to demonstrate the availability of its proposed transmitter site as required by Section 21.15(a) of the Rules.[3] For MMDS applications subject to the Commission's lottery proceedings, a demonstration of reasonable assurance of site availability is sufficient prior to lottery. However, once the lottery is held, a license will not be granted until a fully-executed lease, option agreement or, other concrete evidence of site availability is submitted. *Revision of Part 21 of The Commission's Rules*, 2 FCC Rcd 5713, 5721 (1987). Thus, Line's mere statement that a site was available in 1983, when it submitted its application, did not satisfy the requirement that "concrete evidence" of the availability of its proposed transmitter site be submitted after the lottery date.

6. Line had a duty to submit all curative amendments to its application within thirty days of the Division's written request, or obtain an extension of time. *VisionAire, Inc.*, 5 FCC Rcd 1952 (Comm. Car. Bur. 1990). Its failure to submit curative amendments for almost nine months substantially impeded the expeditious offering of MMDS in Flagstaff. In view of the foregoing, dismissal of this application for failure to comply with the Division's requests for information was proper, reconsideration of that action is not warranted, and reinstatement is not justified.

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[1] The deficiencies cited were the absence of: (1) a signed lease or option to lease agreement, pursuant to 47 C.F.R. § 21.15(a); (2) current financial data, pursuant to 47 C.F.R. § 21.17(b); (3) a public interest statement, pursuant to 47 C.F.R. § 21.13(a)(4); (4) non-affiliation statement, pursuant to 47 C.F.R. §§ 21.900, 21.903(b)(1) and 21.903(b)(2); (5) antenna structure heights in agreement with FCC records; (6) a local maintenance plan; (7) the answers to questions on FCC Form 435 pages 5, 6 and 7; and (8) an analysis demonstrating that the proposed facility will not cause any harmful interference to existing co-channel or adjacent channel ITFS receiver locations.

[2] We note that in July 12, 1988 and July 29, 1988 letters to the Commission, Line did attempt to cure deficiencies in its application by providing some of the information requested. However, Line failed to fulfill the site availability requirement, pursuant to Section 21.15(a) of the Commission's Rules.

[3] Section 21.15(a) provides, *inter alia:* "Applicants proposing a new station location... shall indicate whether the station site is owned. If it is not owned, its availability for the proposed radio station site shall be demonstrated. Under ordinary circumstances this requirement will be considered satisfied if the site is under lease or under written option to buy or lease..." Moreover, Line was required by Section 21.13(c) to submit a lease or lease option agreement upon request by Division. Section 21.13(c) provides, *inter alia:* "In addition to the general application requirements of §§ 21.13 through 21.17 of this part, applicants shall submit any additional documents, exhibits, or signed written statements of fact... (2) As the Commission, at any time after the filing of an application... may require from any applicant... to enable it to determine whether a radio authorization should be granted."

III. ORDERING CLAUSE

7. Accordingly, IT IS ORDERED that the petition for reconsideration filed by Line of Site, Inc. regarding its Flagstaff, Arizona MMDS application IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

MDS SIGNAL GROUP File No. 8174-CM-P-83

For Authority to Construct
and Operate a Multichannel
Multipoint Distribution Service
station on the F-group channels
at Dothan, Alabama

ORDER ON RECONSIDERATION

Adopted: February 19, 1993; Released: March 1, 1993

By the Chief, Domestic Facilities Division:

1. This matter concerns a petition for reconsideration of the dismissal by the Domestic Facilities Division (the Division) of the above-referenced application of MDS Signal Group (Signal) to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the F-group channels at Dothan, Alabama and for reinstatement of the application. For the reasons discussed below, we deny the petition.

I. BACKGROUND AND CONTENTIONS

2. Signal's application was selected for qualification review as the result of a Commission lottery. Subsequently, the Division initiated a qualification review of the application, pursuant to Section 21.32 of the Commission's Rules, 47 C.F.R. § 21.32. Upon examination, the application was found to contain several deficiencies that precluded the staff from making a finding that Signal was legally, technically, financially, and otherwise qualified to be a licensee, and that grant of the application would serve the public interest. By letter dated January 28, 1987, Signal was notified of these deficiencies[1] and provided an opportunity to cure them within thirty (30) days of the date of the letter.

3. Pursuant to Sections 21.13(c), 21.20(d) and 21.28(d) of the Commission's Rules, and by letter dated June 12, 1987, the Division dismissed, without prejudice, Signal's application for failure to comply in a timely manner with its request for information.

4. On September 21, 1987, Signal filed the instant petition for reconsideration of the Division's dismissal action. Signal maintains that reinstatement of the application would be in the public interest because it has substantially complied with the staff's request for information by curing most, but not all, of the outstanding deficiencies. Signal acknowledges that there was a delay in responding to the Division's deficiency letter, but states the delay was due to "misadventures, misfilings and misplacements" of documents needed to cure its application.

II. DISCUSSION

5. Signal failed to file its petition for reconsideration in a timely manner. Section 405 of the Communications Act of 1934, as amended, 47 U.S.C. § 405 (1983), prescribes that petitions for reconsideration "must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of." *See also* 47 C.F.R. § 1.4(b)(5). Because the time period for filing petitions for reconsideration is prescribed by statute, the Commission may not ordinarily waive or extend the filing period. *Reuters Limited v. FCC*, 781 F.2d 946 (D.C. Cir. 1986)("...we conclude that the Commission acted beyond its lawful authority when it entertained the belated petition for reconsideration."); *Fortuna Systems Corp.*, 3 FCC Rcd 5122, 5123 (1988); *Metromedia, Inc.*, 56 FCC 2d 909 (1975). Because Signal's petition for reconsideration was filed on September 21, 1987, approximately two months after the required period, the petition was late-filed, and is hereby denied.[2]

6. In view of the foregoing, dismissal of the application for failure to comply with the Division's requests for information was proper, reconsideration of that action is not warranted, and reinstatement is not justified.

III. ORDERING CLAUSE

7. Accordingly, IT IS ORDERED that the petition for reconsideration filed by MDS Signal Group for its MMDS application at Dothan, Alabama IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

[1] The deficiencies cited were the absence of: (1) a signed lease or option to lease agreement, pursuant to 47 C.F.R. § 21.15(a); (2) current financial data, pursuant to 47 C.F.R. § 21.17(b); (3) non-affiliation statement, pursuant to 47 C.F.R. §§ 21.900, 21.903(b)(1) and 21.903(b)(2); (4) no record of proposed antenna structure heights; and (5) an analysis demonstrating that the proposed facility will not cause any harmful interference to existing co-channel or adjacent channel ITFS receiver locations.

[2] Because we are dismissing Signal's petition for reconsideration on procedural grounds, we need not reach the merits of the arguments made by the petitioner.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Paul Communications, Inc. — File No. 11657-CM-P-83

For Authority to Construct and Operate a Multichannel Multipoint Distribution Service station on the E-group channel at El Centro, California

ORDER ON RECONSIDERATION

Adopted: February 19, 1993; Released: March 1, 1993

By the Chief, Domestic Facilities Division:

1. This matter concerns a petition for reconsideration of the dismissal by the Domestic Facilities Division (the Division) of the application of Paul Communications (Paul) Inc., to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the E-group channel at El Centro, California and for reinstatement of the application. For the reasons discussed below, we deny the petition.

I. BACKGROUND AND CONTENTIONS

2. As the result of a Commission lottery, Paul's application was selected for qualification review. Subsequently, the Division initiated a qualification review of the application, pursuant to Section 21.32 of the Commission's Rules, 47 C.F.R. § 21.32. Upon examination, the application was found to contain several deficiencies that precluded the staff from making a finding that Paul was legally, technically, financially, and otherwise qualified to be a licensee, and that a grant of the application would serve the public interest. By letter dated October 17, 1986, Paul was notified of these deficiencies[1] and provided an opportunity to cure them within thirty (30) days of the date of the letter.

3. Pursuant to Sections 21.13(c), 21.20(d) and 21.28(d) of the Commission's Rules, and by letter dated June 12, 1987, the Division dismissed, without prejudice, Paul's application for failure to comply in a timely manner with its request for information. The dismissal action appeared on public notice June 24, 1987.

4. On July 24, 1987, Paul filed the instant petition for reconsideration of the Division's dismissal action. Paul maintains that reinstatement of the application would be in the public interest because it has substantially complied with the staff's request for information by curing most of the outstanding deficiencies.

II. DISCUSSION

5. As of the date of the Division's deficiency letter, October 17, 1986 and almost one year later, Paul still had not submitted the information necessary for evaluation of its qualification to be an MMDS licensee. For example, Paul had not submitted a lease, lease option agreement, or other "concrete evidence" to demonstrate the availability of its proposed transmitter site as required by Section 21.15(a) of the Rules.[2] For MMDS applications subject to the Commission's lottery proceedings, a demonstration of reasonable assurance of site availability is sufficient prior to lottery. However, once the lottery is held, a license will not be granted until a fully-executed lease, option agreement or, other concrete evidence of site availability is submitted. *Revision of Part 21 of The Commission's Rules*, 2 FCC Rcd 5713, 5721 (1987). Thus, Paul's mere statement that a site was available in 1983, when it submitted its application, did not satisfy the requirement that "concrete evidence" of the availability of its proposed transmitter site be submitted after the lottery date.

6. In addition, Paul failed to file timely the required current financial qualification demonstration.[3] Also, Paul failed to comply with the Division's request to file a Section 21.902(i) non-interference analysis. At the time, Section 21.902(i) required MMDS applicants to submit, prior to receiving a construction authorization and at such time as the Commission requests, an analysis demonstrating that the proposed MMDS facilities will not cause harmful interference to existing co-channel or adjacent channel Instructional Television Fixed Service (ITFS) receiver locations within fifty (50) miles of the MMDS transmitter, or alternatively, an "interference-acceptance" statement from the affected ITFS licensee. By the express language of this rule, an MMDS applicant was required to submit a non-interference analysis upon Commission request. Despite the spe-

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[1] The deficiencies cited were the absence of: (1) a signed lease or option to lease agreement, pursuant to 47 C.F.R. § 21.15(a); (2) current financial data, pursuant to 47 C.F.R. § 21.17(b); (3) a public interest statement, pursuant to 47 C.F.R. § 21.13(a)(4); (4) non-affiliation statement, pursuant to 47 C.F.R. §§ 21.900, 21.903(b)(1) and 21.903(b)(2); (5) antenna structure heights in agreement with FCC records; (6) a local maintenance plan; (7) the answers to questions on FCC Form 435 pages 5, 6 and 7; and (8) an analysis demonstrating that the proposed facility will not cause any harmful intereference to existing co-channel or adjacent channel ITFS receiver locations.

[2] Section 21.15(a) provides, *inter alia:* "Applicants proposing a new station location... shall indicate whether the station site is owned. If it is not owned, its availability for the proposed radio station site shall be demonstrated. Under ordinary circumstances this requirement will be considered satisfied if the site is under lease or under written option to buy or lease... " Moreover, Paul was required by Section 21.13(c) to submit a lease or lease option agreement upon request by Division. Section 21.13(c) provides, *inter alia:* "In addition to the general application requirements of §§ 21.13 through 21.17 of this part, applicants shall submit any additional documents, exhibits, or signed written statements of fact... (2) As the Commission, at any time after the filing of an application... may require from any applicant... to enable it to determine whether a radio authorization should be granted."

[3] We note that a financial certification was submitted on reconsideration.

cific request that this analysis be submitted by November 17, 1986, Paul failed to do so. *See Fortuna Systems Corp.*, 3 FCC Rcd 5122, 5123 (Comm. Car. Bur. 1988).

7. Paul had a duty to submit all curative amendments to its application, as directed by the Division, no later than November 17, 1986 or seek an extension of time. *Vision-Aire, Inc.*, 5 FCC Rcd 1952 (Comm. Car. Bur. 1990). Its failure to submit curative amendments for almost one year substantially impeded the expeditious offering of MMDS in El Centro. In view of the foregoing, dismissal of this application for failure to comply with the Division's requests for information was proper, reconsideration of that action is not warranted, and reinstatement is not justified.

III. ORDERING CLAUSE

8. Accordingly, IT IS ORDERED that the petition for reconsideration filed by Paul Communications, Inc., regarding its El Centro, California MMDS application IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-25

In the Matter of

Implementation of Section 25
of the Cable Television Consumer
Protection and Competition Act
of 1992

Direct Broadcast Satellite
Public Service Obligations

NOTICE OF PROPOSED RULE MAKING

Adopted: February 11, 1993; Released: March 2, 1993

Comment Date: May 24, 1993
Reply Comment Date: June 30, 1993

By the Commission: Commissioner Marshall not participating.

TABLE OF CONTENTS

	Paragraph
I. INTRODUCTION	1
II. DEFINITION OF PROVIDER OF DBS SERVICE	2
A. Licensees Under Part 100	7
B. Entities Under Part 25	9
C. Applicability of Definitions	18
III. PUBLIC INTEREST REQUIREMENTS	20
A. Political Broadcasting Rules	21
B. Other Public Interest Requirements	29
C. Opportunities for Localism on DBS	31
IV. CARRIAGE OBLIGATIONS FOR NONCOMMERCIAL, EDUCATIONAL, AND INFORMATIONAL PROGRAMMING	37
V. ADMINISTRATIVE MATTERS	52

I. INTRODUCTION

1. On October 5, 1992, Congress enacted the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act").[1] Section 25 of the 1992 Cable Act, which added new Section 335 to the Communications Act of 1934, as amended, requires the Commission to impose on providers of direct broadcast satellite service video programming obligations which must include, at a minimum, the political programming requirements set forth in Sections 312(a)(7) and 315 of the Communications Act of 1934. In addition, Section 25 requires the Commission to adopt rules governing the reservation and availability of channels for noncommercial educational and informational programming at reasonable rates. Finally, the Commission must examine the opportunities that the establishment of DBS service provides for fulfilling the Commission's long standing goal of service to local communities. In this Notice of Proposed Rule Making, we seek comment on various proposals to implement these provisions of Section 25.

II. DEFINITION OF PROVIDER OF DBS SERVICE

2. As a threshold matter, it is important to identify specifically the types of entities that will be subject to the video programming obligations proposed in this proceeding. Section 25(a) of the 1992 Cable Act, which addresses the video programming obligations to be adopted by the Commission, states generally that these requirements should cover "providers of direct broadcast satellite service" providing video programming.[2] Section 25(b), which sets forth the noncommercial channel reservation requirements, includes a more specific definition of the DBS entities that are to be subjected to its requirements. This definition makes reference to entities operating in conjunction with licenses under Parts 25 and 100 of the Commission's Rules.

3. Deciding which DBS entities should be covered by subsections 25(a) and (b) of the 1992 Cable Act is complicated by both our DBS regulatory regime and the complexities of the satellite programming distribution business. By way of background, the term direct broadcast satellite ("DBS") service originally referred to a "radiocommunication service in which signals from earth are retransmitted by high power, geostationary satellites for direct reception by inexpensive earth terminals" as regulated by Part 100 of the Commission's Rules.[3] This Part 100 service was established by the Commission in 1982 to use specific frequencies in the Ku-band[4] that would provide service on a regional and/or national basis. Although the Commission has issued 9 construction permits in this Part 100 service, none of these permittees has commenced operations.[5]

4. Since 1982, the term DBS service has also been used to refer to direct-to-home delivery of programming by fixed-satellite service ("FSS") operators using low-powered and medium-powered satellites in the C-band (4/6 GHz) frequency bands and in portions of the Ku-band. The

[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992).
[2] *See* Sections 25(a) and (b)(1) of the Cable Act.
[3] *See Report and Order* in Gen. Docket No. 80-603 (*"DBS Report and Order"*), 90 FCC 2d 676, 677 n.1 (1982).
[4] The Ku-band generally refers to a band of frequencies at approximately 12 GHz. Specifically, DBS licensees under Part 100 use frequencies between 12.2 and 12.7 GHz for communications direct to the home.
[5] One DBS satellite, carrying at least three different program packages for three different companies totalling over 100 channels, is scheduled for launch within a year.

satellites used to transmit this programming are licensed under Part 25 of the Commission's Rules and do not utilize the same frequencies or orbital positions as the Part 100 service. Since these satellites are not as high-powered as the Part 100 satellites, they require larger receive antennas. Currently, most satellite delivery of video programming is occurring in the C-band and includes transmissions to and from broadcast stations, transmissions from program sources to the headends of cable systems, and transmissions to home satellite dish ("HSD") or "backyard" receivers.[6] However, some services also are being provided under Part 25 of our Rules in the Ku-band.[7]

5. At the outset, we note that Congress apparently intended to exclude C-band DBS operations from the obligations to be imposed by Section 25 of the 1992 Cable Act. The definition of affected DBS programming providers set forth in subsection (b)(5) is expressly limited to entities operating pursuant to Parts 25 or 100 of our Rules in the Ku-band. Although there is some question as to whether the definition in subsection (b)(5) applies to both subsections (a) and (b), we tentatively conclude that Congress intended to limit the scope of Section 25 to DBS services provided in the Ku-band. We seek comment on this interpretation.

6. In the paragraphs that follow, we seek comment on the various components of the statutory definition in subsection 25(b)5 and on whether this definition applies to subsection 25(a) as well. We wish to emphasize, however, that the business of providing DBS services involves a variety of potentially complex interrelationships that may affect the application of the different obligations imposed by Section 25. For example, there can be several layers of entities involved in the actual delivery of video programming by satellite to viewers' homes through DBS systems. A DBS service provider could own the satellite and control the acquisition and transmission of such programming to home viewers. Alternatively, the owner of a satellite could lease some or all of the channels on its satellite to entities which provide video programming directly to home viewers. Further variations of these scenarios could occur, such as a satellite owner selling or leasing channels to third parties which in turn sell or lease channels to the actual entities providing the video programming. In addition, the actual entity responsible for providing the video programming to home viewers may contract with other program suppliers and distributors to handle specific channels on its DBS system. The prevalence of these and other arrangements in the DBS industry obviously complicates the task of identifying which entity controls the use of a satellite channel and which controls the programming delivered over that channel. Accordingly, to assist us in interpreting the statutory definition and the obligations imposed by the new Act, commenters are asked to provide information about the distribution of programming in the DBS industry and to address how the practical realities of that distribution process affect the application of Section 25.

A. Licensees Under Part 100

7. We now turn to an analysis of the statutory definition of DBS provider set forth in subsection 25(b) of the 1992 Cable Act. That subsection includes two alternative definitions. The first involves "a licensee for a Ku-band satellite system under part 100 of title 47 of the Code of Federal Regulations." When the DBS service was created in 1982, the Commission took a flexible regulatory approach, in which Part 100 licensees were not required to conform to any particular regulatory model, in order to encourage the development of this new service. As a result, licensees under Part 100 of our rules have the option of operating and being regulated in whole or in part as broadcasters, who are subject to the requirements of Title III of the Communications Act.[8] A licensee that is not a broadcaster can lease satellite capacity to a "customer-programmer" who controls the use of those channels and uses the leased channels to distribute programming by satellite directly to the homes of viewers.[9]

8. Regardless of the regulatory classification of DBS licensees, we tentatively conclude that, in view of the explicit language of Section 25, licensees under Part 100 should be held ultimately responsible for ensuring that the obligations adopted pursuant this section are met. Exercise of this responsibility should not be difficult for Part 100 licensees who retain control over the programming carried on their systems. However, depending on the distribution arrangement involved, we recognize that a Part 100 licensee as a practical matter might be forced to delegate the day-to-day functions of implementing these requirements to the entity that is actually controlling the distribution of programming by satellite to home viewers. *See also House Report* at 124 (channel reservation requirements apply to DBS service providers who use satellite facilities, not licensees unless licensee provides programming). As noted above, we request information on the division of functions and duties and the typical contractual and practical relationships that occur or are developing among the various entities involved in the delivery of programming in the Part 100 DBS service. Commenters should also address

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[6] These HSD receivers are large (*i.e.*, over 2 meters in diameter) and are to be distinguished from the smaller earth terminals needed for DBS reception in the Ku-band, which could range from 1 meter to 1/2 meter or less. *See* Johnson, Leland L., *Direct Broadcast Satellites: A Competitive Alternative to Cable Television*, Rand, 1991 at v-vi and 5-6.

[7] FSS licensees under Part 25 use frequencies between 11.7 and 12.2 GHz for their downlink (transmission to earth) facilities.

[8] "Broadcasting" is defined in Section 3(o) of the Communications Act as "the dissemination of radio communications intended to be received by the public directly, or by the intermediary of relay stations." 47 U.S.C. 153. Although broadcasters must comply with some statutory restraints -- such as the political broadcasting laws discussed *infra* -- they retain control over the use of their stations and can select what material is aired. The Commission has previously concluded that DBS licensees who provide subscription programming services do not provide broadcast service as defined in Section 3(o) and are not subject to the statutory political broadcasting requirements. *See Subscription Video*, 2 FCC Rcd 1001 (1987), *aff'd sub nom. National Association for Better Broadcasting v. FCC*, 849 F.2d 665 (D.C. Cir. 1988).

[9] Commenters may address any relevant implications that the particular regulatory classification(s) under which a Part 100 licensee operates, and the obligations imposed pursuant to that classification, may have on the requirements imposed by this section of the 1992 Cable Act. They also may address parallel questions for distributors using Part 25 facilities. *See* para. 16 *infra*.

how the practical aspects of program delivery in this service should affect our treatment of the responsibilities imposed by Section 25 consistent with the 1992 Cable Act.

B. Entities Under Part 25

9. The section 25 definition of a DBS provider also includes another type of entity, namely "any distributor who controls a minimum number of channels (as specified by Commission regulation) using a Ku-band fixed service satellite system for the provision of video programming directly to the home and licensed under part 25 of title 47 of the Code of Federal Regulations."[10] As discussed below, we seek comment on the proper interpretation and implementation of this statutory definition.

10. The first component of this part of the DBS provider definition is that the entity be a distributor who controls channels. The statute does not define the term "distributor" or "control." Our initial view is that distributors would include parties that are engaged in various activities related to the delivery of video entertainment programming such as program packaging, program delivery, subscription billing and customer service.[11] In addition, we must determine what actions such a distributor must take to be considered in "control" of channels. As discussed below, although this term could mean licensees who have basic technical control of a transponder, it may also have been intended to mean control through lease, sale or other arrangement with a satellite operator that gives the distributor the right to select and transmit its programming and limit access to that programming.

11. At the present time, we are aware of only one company, PRIMESTAR Partners LP (PRIMESTAR),[12] that offers video programming directly to the home in the Part 25 Ku-band. PRIMESTAR uses leased capacity on a domestic fixed-satellitelicensed to and operated by GE American Communications Inc.(GE). PRIMESTAR began operations in mid-1991 and currently offers seven superstations',[13] three pay-per-view channels and one foreign language channel (Japanese) to viewers in a limited geographic area. It rents satellite reception equipment to homeowners and provides subscription service delivered by satellite and sold through cable operators who act as agents for PRIMESTAR. Another entity, Skypix, has announced plans to offer multiple channels of programming directly to homes via the Ku, fixed-satellite bands, using digital compression technology. We assume that the statutory definition would encompass entities such as PRIMESTAR and Skypix and request information about characteristics of these entities that should be considered in further refining the definition of distributor. We also request information about entities presently offering such service or any other potential services that plan to use Ku-band fixed-satellites for the provision of direct-to-home video programming.

12. As required by Section 25, the Commission must also decide the appropriate number of channels that would trigger the obligations of Section 25 for a Part 25 program distributor. We seek comment on what types of considerations would be relevant in identifying this specific number for purposes of the rules we will adopt in this area. We could consider the percentage controlled by a distributor of the total number of channels used to provide such service in determining how many channels a particular distributor must control before it is subject to these rules. In such an analysis, minimum numbers might be better cast in terms of percentages of these totals. We also seek comment on other factors that may be relevant to this aspect of the statutory definition, such as the degree to which the distributor affects competition or viewpoint diversity in the video distribution market.

13. In addition, we will need to define the term "channel." Under Part 100 rules, a channel normally refers to a 24 MHz portion of radio spectrum. In the fixed-satellite service, the Part 25 rules do not specify the amount of spectrum included in a "channel". However, we understand that it is customary for a fixed-satellite operator to use approximately 30 to 36 MHz of spectrum to provide a video signal of comparable quality to that of a Part 100 channel. We seek comment on this understanding. In addition, using present technology, the entire width of a 40 MHz satellite transponder is usually necessary to transmit a studio broadcast quality video signal, and the number of programs transmitted is directly related to the transponder capacity of the space station. With the advent of digital compression technology and the ability to transmit several video programs using a single transponder, we must determine whether "channel" should refer to a whole transponder or to a single one of the program services contained in a compressed signal. We also must recognize that the amount of compression that can be accomplished within a single transponder channel will depend on the type of programming transmitted. Thus, we are initially inclined to count or "define" channels for purposes of triggering this obligation in terms of an explicit number of specified 24-MHz-wide channels for Part 100 licensees and in terms of the number of transponders and/or some multiple of 30-36 MHz used for video programming by Part 25 DBS

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[10] Fixed-satellite services are offered in both the C-band and the Ku-band. Ku-band refers to 11.7-12.2 GHz downlink frequencies. *Amendment of C-Band Satellite Orbital Spacing Policies to Increase Satellite Video Services to the Home (3° Spacing)*, 7 FCC Rcd 456 (1992). As discussed *infra*, the majority of video programming offered for reception by home satellite antennas is transmitted in the C-band.

[11] For example, we note that the 1992 Cable Act contains a definition of a multichannel video programming distributor that includes, *inter alia*, "a television receive only satellite program distributor who makes available for purchase by subscribers or customers, multiple channels of video programming." *See* 47 U.S.C. Section 602(12). *See also* "definition of video programming" in 47 U.S.C. Section 522(19). Similarly, the Satellite Home Viewer Act of 1988, 17 USC Section 119, defines "distributor" as an entity which contracts to distribute transmissions from a satellite carrier to subscribers for private home viewing.

[12] According to a 1990 filing, this company is a limited partnership including nine subsidiaries of multiple system cable operators and GE. These subsidiaries include ATC Satellite Corp., Comcast DBS, Inc., Continental Satellite Company, Inc., Cox Satellite, Inc., New Vision Satellite, TCI K-1, Inc., United Artists K-1 Investments, Inc., Viacom K-1, Inc., and Warner Cable SSD, Inc. Letter from K Prime Partners (PRIMESTAR's previous name), August 27, 1990, filed in Gen. Docket No. 89-88.

[13] A superstation, at least for purposes of the Copyright Act, is defined as a television broadcast station, other than a network station, licensed by the Federal Communications Commission that is secondarily transmitted by a satellite carrier. 17 U.S.C. Section 119(d)(9).

providers. We seek comment on these issues and, in particular, on technical factors that might impact our determinations.

14. Because direct-to-home video service is a new use of fixed-satellite facilities in the Ku-band, the distributors involved are new companies and possibly have limited resources. In addition, services using Part 25 facilities may offer much less channel capacity[14] than Part 100 DBS service proposals, which include as many as 100 channels or more of programming[15] . We request information on what number of channels can be used to trigger imposition of obligations without risking the economic viability of these new service providers, as well as any inherent service limitations which would be relevant.

15. A third component of the alternate definition of a DBS provider is that the distributor use a Ku-band fixed-satellite system for the provision of video programming directly to the home. This requirement appears to require little interpretation. As noted above, we are aware of only one entity currently using fixed-satellite facilities for direct-to-home programming services in the Ku-band. Most video service to home antennas is provided in the C-band which is used to provide programming to cable head ends for distribution to cable subscribers. The home satellite earth station industry thus has concentrated its service offerings in the C-band in order to utilize the programming already being transmitted in that band, and most home satellite antennas are equipped to receive signals only in this lower frequency band. Direct-to-home service in the Ku-band is an emerging market, and although there has been speculation that there will be an eventual migration of programming delivery from the C-band to the Ku-band, we have not seen significant evidence of this as yet.[16] We request information and comment regarding the potential expansion of fixed-satellite home video service offered in Ku-band.

16. The final component of the section 25 definition is that there be a license issued under Part 25 of the Commission's rules. Part 25 satellite facilities are authorized to operate within certain technical parameters, and the space station licensee may sell or lease on a short or long term basis any of the transponders on its satellite,[17] as long as the licensee remains in technical control of the facility. The Commission does not regulate the type of traffic carried by individual satellites. An operator is free to change the traffic on its facility without any Commission approval, provided that no technical modifications are necessary. Similarly, if the operator has several satellites it may switch traffic from one to another without Commission approval.[18] We request comment on what effect a satellite licensee's operation as a common carrier might have on the application of obligations imposed pursuant to Section 25. A programming distributor that is a customer-programmer of a Part 25 licensee can lease both earth station and space station capacity and, because it is not a licensee, does not need Commission authorization to provide programming service.

17. A question arises whether the definitional reference to a Part 25 license was intended to mean that the distributor must hold the license or that the satellite system used to distribute programming must be licensed under Part 25. The answer to that question determines whether the programmer customer or the space station licensee is the DBS provider responsible for fulfilling the obligations of Section 25 of the 1992 Cable Act. In the case of Part 100 licensees, this question can be more easily answered because the Section 25 definition specifically describes "licensees" as the DBS service providers. The most natural reading of the statutory language is that the phrase "licensed under part 25" refers to the satellite used to distribute programming. Thus the statute does not appear to mandate that a distributor also be a Part 25 licensee in order to be implicated by the (b)(5) definition. If so, the requirement for fulfilling the Section 25 obligations rests with the distributor and not with the satellite licensee. We request comment on all of these issues. In particular, commenters should address the circumstances in which a licensee may or may not be a "distributor" and whether a licensee's status as a common carrier should affect that determination.[19] Finally, commenters should also address what enforcement mechanisms can be applied to entities that are not Commission licensees.

C. Applicability of Definitions to Each Subsection

18. We seek comment on the extent to which the obligations imposed by Section 25 were intended to apply to each type of entity included in the definition. The carriage obligations set out in subsection (b) of Section 25, for example, provide that the duty to reserve channel capacity for noncommercial programming is imposed as a "condition of any provision, initial authorization, or authorization renewal for a provider of direct broadcast satellite service". This language could be read to suggest that Congress intended the obligations contained in this portion of the statute to adhere to individual service providers on a staged basis at the time they are granted (and as conditions to) authorizations or license renewal rather than on the effective date of a specific rule. We seek comment on this issue. In addition, as discussed in the previous section, a distributor programmer is not licensed under Section 301 of the Communications Act to provide direct-to-home programming in the Ku-band, fixed-satellite service. Rather, the space station operator holds the statutorily required license. We seek comment on how regulations can impose carriage obligations as a condition of provision of service when no authorization is currently necessary. Commenters should address, in this connection, any circumstances under which it was the intent of this section to exempt

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[14] PRIMESTAR currently offers 11 channels of programming.

[15] No Part 100 DBS licensee is currently licensed for more than 27 "standard" 24-mHz DBS channels (see discussion *infra*). Digital compression technology, however, enables the provision of more that 100 different program services on a Part 100 system with 27 "standard" channels assigned to it. Such technology would appear to be technically feasible in the Part 25 service as well, thereby increasing the number of potential program services that could be offered by Part 25 program providers.

[16] *See, 3[0] Spacing, supra* n.10.

[17] *See, Domestic Fixed-Satellite Transponder Sales*, 90 FCC 2d 1238 (1982), *aff'd sub nom. Wold Communications, Inc. v FCC*, 735 F.2d 1564 (D.C. Cir. 1984).

[18] Because of the economic impact that such changes can have on customers, operators do not routinely shift satellite traffic. *See, 3[0] Spacing, supra* n.10.

[19] *See, House Report* at 124.

non-licensee DBS programmers who use Part 25 facilities from the noncommercial carriage obligations and when such obligations flow more naturally to licensees who have the ultimate authority to allocate the use of their transmission capacity.

19. In addition, as noted, the definition of provider of DBS service in subsection (b)(5) states that it is given "for purposes of this subsection." The deliberate use of the word "subsection" in lieu of "section" suggests that the definition was intended to apply to the reservation and access provisions of subsection (b) and not necessarily to the political broadcasting/public interest requirements of subsection (a). We solicit comment on this issue and on whether there is any other basis for inferring that Congress might have intended the definition to have such limited applicability. If the definition of DBS provider is limited to the obligations imposed in subsection (b), then what definition of "provider of DBS service" should be used for subsection (a) political broadcasting/public interest requirements? We note, for example, that the House and' Senate versions of this section expressly exempted common carriers from these requirements, but that exemption was not carried over to the final codification. The *Conference Report* contained no explanation of why the language exempting common carriers was dropped from the final version passed by Congress. Presumably, however, such an exemption would have been inconsistent with Congress' apparent intention to apply channel reservation requirements to DBS distributors who may use satellites licensed to common carriers in the Ku-band. Commenters should address how and whether the programming requirements we ultimately adopt pursuant to subsection 25(a) can, as a practical matter, be applied to common carrier licensees or to programmer distributors and should discuss possible enforcement mechanisms.

III. PUBLIC INTEREST REQUIREMENTS

20. Section 25(a) of the 1992 Cable Act provides that:

> [t]he Commission shall, within 180 days after the date of enactment of this section, initiate a rulemaking proceeding to impose, on providers of direct broadcast satellite service, public interest or other requirements for providing video programming. Any regulations prescribed pursuant to such rulemaking shall, at a minimum, apply the access to broadcast time requirement of section 312(a)(7) and the use of facilities requirements of section 315 to providers of direct broadcast satellite service providing video programming. Such proceeding also shall examine the opportunities that the establishment of direct broadcast satellite service provides for the principle of localism under this Act, and the methods by which such principle may be served through technological and other developments in, or regulation of, such service.[20]

A. Political Broadcasting Rules

21. Section 25(a) mandates that, at a minimum, the Commission apply the access to broadcast time requirement of Section 312(a)(7) and the use of facilities requirements of Section 315 of the Communications Act to providers of direct broadcast satellite service providing video programming. In compliance with this statutory directive, we propose to apply our existing rules implementing Sections 312(a)(7) and 315 to DBS service providers, as they will be defined pursuant to Section II, above, and to tailor these rules, as discussed below, to account for differences between multichannel DBS systems and traditional broadcast stations.[21]

22. *Reasonable Access to DBS Systems by Federal Candidates.* Section 312(a)(7) of the Communications Act and Section 73.1944 of the Commission's Rules require stations to afford reasonable access for federal candidates to their facilities, or to permit federal candidates to purchase "reasonable amounts of time."[22] The Commission recently clarified and codified its policies regarding the reasonable access requirement in MM Docket 91-168.[23] Therein, the Commission continued its longstanding policy of relying upon the reasonable, good faith judgments of licensees to provide reasonable access to federal candidates and determining compliance on a case-by-case basis.[24] Since the reasonable access requirement was extensively considered in MM Docket 91-168, we do not believe it is necessary to revisit those issues in this proceeding. Accordingly, we propose to apply Section 73.1944 of the Rules and the policies codified in MM Docket 91-168 to DBS providers.

23. However, we recognize that there may be some additional issues relating to DBS that warrant comment. For example, this appears to be the first time that the reasonable access requirements of Section 312(a)(7) will be ap-

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[20] 1992 Cable Act, § 25(a).

[21] To the extent that a DBS service provider carries the programming of a terrestrial broadcast television station, we believe that it should be the responsibility of the terrestrial broadcast station, and not the DBS service provider, to ensure compliance with the political broadcasting requirements of Sections 312(a)(7) and 315 of the Communications Act on that channel since the TV station is already under an obligation to do so. This is the approach that the Commission has taken in the past with respect to cable systems carrying the programming of broadcast television stations. Likewise, if a cable television operator were to carry the programming of a DBS channel, then it should be the responsibility of the DBS service provider, not the cable television operator, to comply with the political broadcasting laws on that channel since the DBS service provider will already be under an obligation to do so. We solicit comment on these views.

[22] This right of access does not apply to candidates for state or local offices. Specifically, Section 312(a)(7) of the Communications Act states:

> (a) The Commission may revoke any station license or construction permit ... (7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.

[23] *Report and Order* in MM Docket No. 91-168, 7 FCC Rcd 678 (1991) ("*Codification Report and Order*"), *Erratum*, 7 FCC Rcd 920 (1992), *recon., Memorandum Opinion and Order*, 7 FCC Rcd 1616 (1992) ("*Sponsorship ID MO&O*"), *recon., Memorandum Opinion and Order*, 7 FCC Rcd 4611 (1992) ("*Codification MO&O*").

[24] *Codification Report and Order*, 7 FCC Rcd at 680-681.

plied to video delivery systems consisting of multiple channels of programming service.[25] We solicit comment as to what constitutes reasonable access in such a situation. Should a DBS provider that controls multiple channels be required to make all video channels available to federal candidates? In this regard, we note that, as a general matter, radio and TV licensees must make all day-parts available to federal candidates but not specific programs within those dayparts. Further, in providing equal opportunities for opposing candidates under Section 315 of the Communications Act, which will be discussed below, cable systems have never been required to make specific channels available or to take into account the demographics of particular channels. Rather, cable systems have been informally advised to air opposing political advertisements on channels with comparable audience size. Should such an approach be followed by DBS providers in acting upon requests by federal candidates for access to DBS systems? If not, what guidelines should be used for making channels available and taking into account demographic factors? Alternatively, should DBS operators have the discretion to place all political advertisements on one channel or a limited number of specific channels? If such an approach were followed, then to what extent should "advertisement-free" channels, which are funded on a subscription basis, be available for political advertising?

24. We also realize that the burden of the reasonable access requirement could be greater for a DBS provider than for a conventional television station, depending on the number of federal candidates that request access. Since a DBS system will provide service to the entire continental United States, potentially any federal candidate could request access. It seems plausible that federal candidates for national offices such as President or Vice President may desire to utilize DBS for political advertising. However, it is unclear as to whether candidates for the U.S. Senate or the House of Representatives will want to use DBS for political ads. The outcome could depend upon the extent to which a DBS operator could localize or regionalize its programming.[26] Accordingly, we solicit comment on the extent to which DBS may be utilized for political advertising by federal candidates and any specific burdens that this may create for DBS operators.[27] Our tentative view is that any such burdens on the DBS operators would be considered in applying these access requirements to DBS. Under current policies, broadcasters have discretion in determining what is reasonable and may take into account a variety of factors in acting upon requests by federal candidates for access. For example, broadcasters can consider "their broader programming and business commitments, including the multiplicity of candidates in a particular race, the program disruption that will be caused by political advertising, and the amount of time already sold to a candidate in a particular race."[28] Under our proposal, DBS providers would have similar discretion. Are there any other factors unique to DBS service providers that would affect this discretion?

25. *Equal Opportunities for All Candidates.* Section 315(a) of the Communications Act of 1934, as amended, and Section 73.1941 of the Commission's Rules provide that, if a broadcast licensee permits any legally qualified candidate to use its station, the licensee must afford equal opportunities to all other such candidates in the use of the station. Both the statute and the rule exempt bona fide newscasts, interviews, documentaries, and news events from these requirements. In addition, Section 73.1940 defines the term "legally qualified candidate."

26. These rules, as well as policies involving the equal opportunities requirement, were reviewed and modified in MM Docket 91-168.[29] We propose to apply Sections 73.1940, 73.1941, and 73.1212(a)(2)(ii)[30] to providers of DBS service, as well as the policies regarding equal opportunities set forth in MM Docket No. 91-168. However, we recognize that MM Docket 91-168 did not consider how requests for equal opportunities should be handled on multiple channel video delivery systems such as DBS. As indicated above, the Commission has never required cable systems to air opposing candidates advertisements on the same channels or to take into consideration the demographics of channels. Rather, the staff has informally advised CATV systems to ensure that the channels utilized have comparable audience size. Should such an approach be followed with respect to DBS? If not, what guidelines and/or demographic factors should be considered? Alternatively, should we resolve these issues on a case-by-case basis as they arise?

27. *Lowest Unit Charge.* Section 315(b) of the Communications Act of 1934, as amended, and Section 73.1942 of the Commission's Rules provide that a broadcast station may not charge any legally qualified candidate for the use of a station more than the lowest unit charge ("LUC") of the station for the same class and amount of time during the same time periods throughout the 45 days preceding a primary or runoff election and the 60 days preceding a general or special election. As we recently clarified in MM Docket 91-168, the scope of a broadcast station's obligations under Section 315(b) of the Act and Section 73.1942 of the Rules includes the duties to disclose and make all discount rates and privileges offered to commercial advertisers available to all legally qualified candidates on the same terms and conditions. We propose to apply Section

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[25] After having reviewed the legislative history of Section 312(a)(7), the Commission previously determined that it does not apply to cable television systems. *See Codification Report and Order*, 7 FCC Rcd at 680 n.11, and *Codification MO&O*, 7 FCC Rcd at 4612 (paras. 12-14).

[26] *See infra* at paras. 28-33.

[27] In its application of the reasonable access provisions in the context of national networks, the Commission has accepted that a request for time need not be honored unless the presidential candidate involved is qualified nationwide. *Carter-Mondale Presidential Committee*, 74 FCC 2d 629, 624 (1979). Paring nation wide access with national candidates thus has some precedent.

[28] *Codification Report and Order*, 7 FCC Rcd at 681-682, citing policy in the *Report and Order on Reasonable Access*, 68 FCC 2d 1079, 1090 (1978). This guideline, as well as others articulated in the *Report and Order on Reasonable Access*, were approved by the United States Supreme Court in *CBS, Inc. v. FCC*, 453 U.S. 367 (1981).

[29] *Codification Report and Order*, 7 FCC Rcd at 683-687.

[30] Section 73.1212(a)(2)(ii) requires visual identification of sponsors of political advertisements in accordance with specific size and duration standards. *See Sponsorship ID MO&O*, 7 FCC Rcd at 1616-17. (1992)

73.1942, as well as the LUC policies codified in MM Docket 91-168, to providers of DBS service providing video programming. We seek comment on this proposal.

28. *Political File Requirements.* Section 73.1943 of the Commission's Rules requires broadcast stations to maintain and permit public inspection of a complete record of all requests for broadcast time made by or on behalf of candidates, the disposition made by the licensee of such requests, and the charges, if any, made for the time. The rule also requires that the file be updated as soon as possible and that information be retained for a period of two years. Since the information required by Section 73.1943 is vital to determine compliance with the political broadcasting requirements of Sections 312(a)(7) and 315 of the Communications Act, we propose to apply Section 73.1943, as well as related policies codified in MM Docket 91-148, to providers of DBS service. In addition, since DBS systems can potentially serve the entire continental United States, we solicit comment on where a provider of DBS service should keep its political file. It is our initial view that it would appear logical to require that the political file be maintained and accessible at the headquarters of the provider of DBS service.

B. Other Public Interest Requirements

29. Section 25(a) of the 1992 Cable Act states that the Commission shall "initiate a rulemaking proceeding to impose, on providers of direct broadcast satellite service, public interest or other requirements for providing video programming." Other than requiring that we apply the political broadcasting requirements of Sections 312(a)(7) and 315 to DBS providers, however, neither Section 25(a) nor its legislative history suggests any other specific requirements. Our tentative view is that, given the flexible regulatory approach taken for DBS and its early stage of development, no other regulations should be considered at this time. In particular, we believe that the reservation requirements for noncommercial, educational and informational programming set out in subsection (b) (described at paras. 18 and 37-40) are intended by Congress to satisfy the public interest obligations of DBS licensees and service providers. We note that the Cable Act provides the basis to impose additional obligations in the future should they be warranted. Nonetheless, commenters may address whether and what other types of regulations should be considered for DBS providers at this time.

30. As a related matter, we note that DBS service providers operating in whole or in part as broadcasters are already subject to the broadcasting provisions of Title III of the Communications Act.[31] Any rules we adopt pursuant to Section 25 of the 1992 Cable Act will not diminish such pre-existing statutory obligations.

C. Opportunities for Localism on DBS

31. Section 25(a) of the 1992 Cable Act also requires that we consider in this proceeding ". . . the opportunities that the establishment of DBS service provides for the principle of localism under this Act, and the methods by which such principle may be served through technological and other developments in, or regulation of, such service." The legislative history of Section 25 provides little guidance as to the intent of Congress, other than to indicate that we should consider "the implications of the establishment of DBS systems for the principle of localism under the 1934 Act" and how that principle may be served by technological developments or regulation.[32] Since DBS systems are essentially designed to serve the entire continental United States, we interpret Congress' directive to be that we consider whether a national mode of programming service such as DBS can accomplish the long standing goal of service to individual communities.

32. Traditionally, the Commission has licensed radio or television stations to serve local communities. This local-based system of licensing emanates from various sections of the Communications Act of 1934, as amended, such as Section 307(b) which provides that "the Commission shall make such distribution of licenses . . . among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."[33]

33. By way of contrast, when the Commission first began to consider adopting policies and rules governing DBS, it recognized that "this satellite technology holds a unique potential to serve large land areas"[34] and that this technology does not fit the traditional model of local broadcast stations. At that time, it was observed by the court that:

> DBS technology is inherently unsuitable for the provision of traditional local broadcast service. The satellites involved cannot presently be located with the requisite precision nor economically equipped with a sufficiently large antenna to provide a spot beam capable of covering only a traditional size local community. Moreover, many of the benefits of DBS -- including narrowcasting and provision of service to less densely populated areas -- could not practically be realized by a local DBS system.[35]

As a result, DBS was authorized as a nonlocal service that would provide service on a national or regional basis. Furthermore, the Commission determined, and the court agreed, that Section 307(b) of the Communications Act does not preclude authorizing a nonlocal service such as DBS.[36]

34. We note that approximately ten years have passed since we adopted our interim rules governing DBS, and that technological changes may have occurred that would change our original conclusions about the necessary configuration of DBS signals. Therefore, in compliance with Congress' directive in Section 25(a) of the 1992 Cable Act, we solicit comment on whether current technology would be capable of adding or deleting satellite delivered programming to accommodate local concerns. In this regard, we note that the feasibility of spot beams with small satellite footprints that would reach a coverage area of 100 to 200 square miles may be in the experimental stage for

[31] *See DBS Report and Order*, 90 FCC 2d at 709.
[32] *See* Senate Committee on Commerce, Science and Transportation, S. Rep. No. 102-92, 102d Cong., 1st Sess. (1991) at 92.
[33] 47 U.S.C. § 307(b).
[34] *See Notice of Proposed Policy Statement and Rulemaking* in Gen. Docket No. 80-603, 86 FCC 2d 719, 737 (1981).
[35] *NAB v. FCC*, 740 F.2d 1190, 1197 (D.C. Cir. 1984).
[36] *DBS Report and Order*, 90 FCC 2d at 685-86; and *NAB v. FCC*, 740 F.2d at 1197-99.

satellites proposed to operate at 18-30 GHz in the Ka-band, but we know of no similar proposals for Ku-band facilities. In addition, even if technically feasible, such a system may be prohibitively expensive as it would add greatly to the complexity of the spacecraft.

35. We further note that, in a previous order, the Commission examined the possibility of requiring receivers to have the capability to delete certain programming according to zip codes that might be subject to syndicated exclusivity rules.[37] That study acknowledged that such technology exists but also pointed out that full implementation would be expensive and burdensome. In addition, it appears that the only feasible way to add substituted programming would be with the use of an additional transmission, either by an additional transponder or compressed channel. Such a method might not be workable if localism were defined as individual communities but might be compatible with a regional definition. However, we again question the amount of economic burden such requirements would place on DBS providers. We seek comments on the technical as well as economic issues raised here.

36. We also believe that any regulations regarding DBS and localism would necessarily depend upon whether it is technically possible and economically feasible to provide local DBS service. Accordingly, we will compile a record on this issue before considering whether any regulations would be appropriate. Our tentative view, however, is that if a local DBS service is not technically and economically feasible, other regulations should not be considered in this area given that DBS is a fledgling industry and that there is an abundance of local broadcast stations and cable television systems that are already serving local needs. However, the 1992 Cable Act permits us to modify this view if circumstances warrant in the future.

IV. CARRIAGE OBLIGATIONS FOR NONCOMMERCIAL, EDUCATIONAL AND INFORMATIONAL PROGRAMMING

37. We will next discuss implementation of the provisions of Section 25(b) of the 1992 Cable Act. Subsections (1) through (3) mandate that:

> (1) [t]he Commission shall require, as a condition of any provision, initial authorization or authorization renewal for a provider of direct broadcast satellite service providing video programming, that the provider of such service reserve a portion of its channel capacity, equal to not less than 4 percent nor more than 7 percent, exclusively for noncommercial programming of an educational or informational nature.
>
> (2) A provider of such service may utilize for any purpose any unused channel capacity required to be reserved under this subsection pending the actual use of such channel capacity for noncommercial programming of an educational or informational nature.
>
> (3) A provider of direct broadcast satellite service shall meet the requirements of this subsection by making channel capacity available to national educational programming suppliers, upon reasonable prices, terms, and conditions as determined by the Commission under paragraph (4). The provider of direct broadcast satellite service shall not exercise any editorial control over any video programming provided pursuant to this subsection.

We will address these issues below.

38. The *Conference Report* indicates that the purpose of Section 25(b) of the Cable Act "is to define the obligation of direct broadcast satellite service providers to provide a minimum level of educational programming."[38] The *Conference Report* states that the reservation requirement was cast in terms of a four to seven percent range to give "the Commission the flexibility to determine the amount of capacity to be allotted."[39] Further, the conferees intended that "the Commission consider the total channel capacity of a DBS system in establishing reservation requirements."[40] In considering this total channel capacity, the *House Report* on H.R. 4850 stated that "the Commission may consider the availability of or the use by a DBS operator of compression technologies."[41]

39. While this legislative history provides some guidance as to Congress' intent with regard to subsection 25(b), there are several important issues that are not discussed but need to be considered. For example, does this section require that discrete channels be reserved for noncommercial use or that a percentage of cumulative time be reserved for noncommercial use? If it is the former, how do we calculate the total channel capacity for a DBS system? Should we count the number of channels licensed or allotted to a DBS distributor? Or, should we count the number of channels supplied to customers? This latter approach would take into account the potential for expanding the number of channels by compression techniques as suggested by the *House Report*. We seek comment on these issues.

40. Next, how should we determine the percentage or number of channels that should be reserved for noncommercial use? Should DBS systems with relatively large total channel capacity be subjected to a greater reservation requirement than systems with relatively less total capacity, as suggested in the *Conference Report*?[42] If so, how do we define a DBS system with a large channel capacity? Also, should the reservation requirement be cast in terms of a percentage or a discrete whole number of channels that

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[37] *Imposing Syndicated Exclusivity Requirements on Satellite Delivery of Television Broadcast Signals to Home Satellite Earth Station Receivers*, 6 FCCRcd 725 (1991).

[38] House Committee on Energy and Commerce, H.R. Conf. Rep. No. 102-862, 102d Cong, 2d Sess. 99 (1992).

[39] *Id.*

[40] *Id.*

[41] House Committee on Energy and Commerce, H.R. Rep. No. 102-628, 102d Cong. 2d Sess 124 (1992). Compression technologies refers to the ability to compress sufficient information to display multiple video programs into the spectrum currently allotted for one channel. As a result, a Part 100 DBS system with 10 allotted channels of specified spectrum width (6 MHz for each channel) could conceivably deliver up to 40 channels of video service. These numbers are expected to increase over time.

[42] *See Conference Report* at 99.

must be reserved? Since the number of channels in DBS systems will likely vary, using a percentage could result in requirements such as 3.5 channels being reserved. To avoid having to reserve parts of channels, we propose that a sliding scale be used so that systems falling into various categories (such as having 20 to 30 channels) would be required to reserve a specific number of channels. These numbers would accommodate the Congressional intent that between four and seven percent of channel capacity be reserved. We seek comment on this proposal. In addition, in order to account for the nascent stage of DBS development, should the reservation requirement increase over time, for individual DBS operators or for the industry as a whole, within the 4% - 7% range specified? We also seek comment on whether DBS providers who are offering service pursuant to executed contracts with programming suppliers should have all existing services grandfathered, and be subject to these reservation requirements only upon the expansion of their service to include additional channels. In this regard, commenters should address the effect on DBS service providers and on the overall availability of reserved channels that would result, and the impact of these results on the achievement of the underlying goals of Congress in enacting this provision.

41. *Responsibility for Programming.* Since Section 25(b) mandates that no editorial control should be exercised by the DBS provider over the noncommercial programming aired, we solicit comment on who should be responsible for the programming in the event Commission Rules or federal statutes are violated. In this regard, we note that under Section 315(a) of the Communications Act, a licensee may not censor material broadcast by or on behalf of a candidate, and, as recognized by the Commission and the U.S. Supreme Court, the responsibility for the programming and any harm it may cause, such as defamation, remains with the candidate.[43] We tentatively believe that a similar approach should be followed here, and that a DBS provider should not be liable for harm or violations caused by programming over which it has no control. We solicit comment on this view. We also request comment on whether the noncommercial program provider using reserved channel capacity must comply with the political broadcasting requirements imposed by Section 25, and if so, how those obligations should be enforced.

42. We also question whether there may be limited circumstances in which a DBS provider can refuse carriage of programming or can restrict its dissemination. In this regard, we note that the Cable Act provides such a mechanism for cable operators that is the subject of a separate rulemaking proceeding.[44] Specifically, Section 12 of the Cable Act permits cable operators to channel indecent programing to a single leased access channel that can only be accessible to subscribers upon request and to prohibit the use of public, educational and governmental access channels for programming that contains obscene material, sexually explicit conduct or material soliciting or promoting unlawful conduct. However, no such mechanism was provided for DBS systems.[45] We solicit comment on the impact of this omission.

43. *Definition of National Educational Programming Supplier.* Section 25(b)(3) requires that a DBS provider shall make its reserved channel capacity available to national educational programming suppliers, and Section 25(b)(5)(B) states that "[t]he term national educational programming supplier' includes any qualified noncommercial educational television station, other public telecommunications entities, and public or private educational institutions." We solicit comment as to the scope of the term national educational programming supplier. We are of the view that this term would encompass not only public television licensees but also entities such as the Public Broadcasting Service which disseminate programming on a national basis to public television stations. To what extent should we incorporate the definitions of Section 397 of the Communications Act of 1934, as amended, which delineate "noncommercial educational broadcast station," "public broadcasting entity," and "public telecommunications entity" for purposes of receiving governmental funding?[46] What other entities should be included? Also, what is the significance of the term "national" in "national educational programming supplier"? We note that Congress explicitly included noncommercial educational television stations, as well as public or private educational institutions, which are all generally perceived to be local entities.[47] Furthermore,

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[43] *See Farmers Educational and Cooperative Union of America v. WDAY, Inc.*, 360 U.S. 525 (1959) (broadcaster not responsible for defamation caused by political candidates advertisement).

[44] *See Notice of Proposed Rule Making* in MM Docket No. 92-258, 7 FCC Rcd 7709 (1992).

[45] The Commission has recognized an exception that gives common carriers, for instance, the right to prohibit the use of their facilities for an illegal purpose. *See Memorandum Opinion, Declaratory Ruling, and Order* in Gen. Docket No. 83-989, 2 FCC Rcd 2819 (1987); and *Humane Society v. Western Union International, Inc.*, 30 FCC 2d 711, 713 (1971). We also note that the Commission has solicited public comment on whether a broadcaster may, consistent with the "reasonable access" provisions of Section 312(a)(7) and the "no censorship" provisions of Section 315(a) of the Communications Act, channel indecent or other programming that may be harmful to children into those hours when there is no reasonable risk of children being in the audience. *See Public Notice*, MM Docket No. 92-254,h),FCC 92-486, released October 30, 1992. We seek comment on the extent to which similar policies could and should be applied to DBS providers consistent with Section 25's "no censorship" provision.

[46] Subsection (b)(6) defines a noncommercial educational broadcast station or a public broadcast station as one which "(A) ... is eligible to be licensed by the Commission as a noncommercial educational radio or television broadcast station and which is owned and operated by a public agency or nonprofit private foundation, corporation, or association; or (B) is owned and operated by a municipality and which transmits only noncommercial programs for educational purposes." Subsection (11) defines a public broadcasting entity as the Corporation for Public Broadcasting or any public broadcasting station licensee or permittee, or "any nonprofit institution engaged primarily in the production, acquisition, distribution, or dissemination of educational and cultural television or radio programs." Subsection (12) defines a public telecommunications entity as "any enterprise which - (A) is a public broadcast station or a noncommercial telecommunications entity; and (B) disseminates public telecommunications services to the public. 47 U.S.C. Section 397.

[47] Commenters may desire to examine the eligibility criteria for the Instructional Television Fixed Service (ITFS) and consider whether these criteria have any relevance here. *See* 47 C.F.R. § 74.932(a) (ITFS licensees may be accredited educational institutions, governmental organizations engaged in the formal education of enrolled students, or nonprofit organizations whose

to qualify for capacity under the reservation provision, or to satisfy a DBS service provider's obligations under this provision, should we take into consideration any corporate relationship between the DBS provider and the program supplier? If so, should some specific portion of the reserved capacity be allowed for program suppliers with a designated relationship with the DBS service provider? In this regard, commenters may address the specific provision prohibiting the DBS service provider from exercising editorial discretion over the material on these channels, as well as Congress' overall intentions for the uses of these reserved channels.

44. *Definition of Noncommercial Educational and Informational Programming.* As previously mentioned, Section 25(b)(1) requires that a portion of a DBS provider's total channel capacity be reserved exclusively for noncommercial educational and informational programming; however, that term is not defined elsewhere in the section. Rather, it appears that the House version of the Cable Act, which was the basis for this section, was cast in terms of various types of enumerated public service uses. As the *House Report* states, these public service uses include programming produced by:

> (1) telecommunications entities, including programming furnished to such entities by independent production services; (2) public or private educational institutions, or entities for educational, instructional, or cultural purposes; and (3) any entity to serve the disparate needs of specific communities of interest, including linguistically distinct' groups, minority and ethnic groups, and other groups.[48]

However, these public service uses were not retained in Section 25(b), and, instead, the Conferees inserted a definition, as described above, of the types of educational programming suppliers that may obtain access to the reserved channels. In view of this brief legislative history, we solicit comment as to whether it is necessary for the Commission to define the term "noncommercial educational and informational programming." If so, what should that term include? Should the Commission decide the types of entities that may seek access to the reserved channel capacity and not enumerate the specific types of programming that may be aired?

45. *Use of Unused Channel Capacity.* Section 25(b)(2) of the 1992 Cable Act permits a DBS service provider to ". . . utilize for any purpose any unused channel capacity required to be reserved under this subsection pending the actual use of such channel capacity for noncommercial programming of an educational or informational nature." According to the *Conference Report,* this language permits a DBS service provider to utilize this reserved channel capacity "until the use of such channel capacity is obtained for public service use."[49] However, neither Section 25(b)(2) nor the *Conference Report* defines what constitutes the "use" of a channel. We note, however, that both the *House Report* and the *Senate Report* contain similar language indicating that the DBS service provider may use these reserved channels until the use of such channel is obtained pursuant to a written agreement for public service use.[50] Accordingly, we solicit comment on what constitutes a "use" of a reserved channel by a noncommercial program provider that would trigger an end to the DBS service provider's ability to utilize such reserved channels. Does the "use" commence with the signing of a written agreement? Or, should a DBS service provider be able to use the reserved channel capacity until the noncommercial program provider is ready to commence broadcasting its programming?

46. *Rates.* Section 25 of the 1992 Cable Act gives the Commission several guidelines in determining what rates are appropriate for the channels required to be set aside under subsection (b)(3). The provision of these guidelines seems to suggest that the Commission assume a role in assuring that rates for non-commercial channels meet the criteria of Section 25. We therefore propose to elaborate on the general statutory guidelines as discussed below and seek comment on our interpretation. Further, we propose to address any disputes with respect to rates in the context of a complaint proceeding and not with rate making procedures.

47. Section 25(b)(4) states that the Commission, in determining whether a rate is appropriate, shall take into account the nonprofit character of the programmer to whom the capacity is provided and any federal funds used to support the programming. Second, the statute provides that the Commission shall not allow prices to exceed 50% of the direct costs of making the channel available. Third, in calculating direct costs, the Commission is required by statute to make certain exclusions.

48. With respect to the issue of nonprofit character and receipt of federal funding, the statute only states that this should be taken into account in any rate determination. Does this language mean that such characteristics should entitle some individual programmers to an even lower rate than 50% of the direct costs of the provider or do they affect in some other manner a final determination of the general rate that should be charged? We solicit comment on this issue.

49. The second statutory guideline provides that the Commission shall not allow prices greater than 50% of the direct costs of making the channel available. We seek comment on the appropriate percentage to use and the financial impact that this provision will have on DBS providers. Because DBS service under both Part 100 and Part 25 regulation is a fledgling industry, would charging noncommercial entities a rate comparable to half of their costs, or less, restrict the further development of the service? If so, does the Commission have any alternative approaches at its disposal given the direct language of the statute? Commenters may particularly address whether or when a rate less than 50% of costs can be reasonably justified. If no alternative approaches are available, should the Commission presume that charging noncommercial entities 50% of direct costs is reasonable?

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purposes are educational and include providing educational and instructional television material to such accredited institutions and governmental organizations). *See also Second Report and Order* in MM Docket No. 83-523, 101 FCC 2d 49, 60 (1985).

[48] *See House Report* at 124.

[49] *Conference Report* at 99.

[50] *See House Report* at 91; *Senate Report* at 124.

50. Third, Section 25(b)(4) directs that the Commission exclude certain costs in its rate determination. Such costs to be excluded are "marketing costs, general administrative costs, and similar overhead costs" as well as "the revenue that such provider might have obtained by making such channel available to a commercial provider of video programming".[51] Under such a guideline, what costs should be included in determination of appropriate rates? The legislative history of the Cable Act[52] states that direct costs should include only the costs of transmitting the signal to the uplink facility and the direct costs of uplinking the signal to the satellite and not any indirect costs such as marketing, general administrative or overhead. Costs such as a proportional share of construction, launch, and insurance of the space station used are not specifically excluded in the legislative history, nor are the continuing costs (on a proportionate basis) of the uplink facility used to provide the channel and a proportional share of the telemetry, tracking and control costs for the space station. In addition, certain overhead or personnel costs that are directly related to making the channel available to nonprofit groups could be considered "direct costs." For example, if a DBS provider has an authorization center or procedure used solely for the provision of noncommercial channels, such costs may be contemplated as allocable to noncommercial programmers. We request comment on how the rules should define "direct costs" for purposes of determining expenses chargeable to noncommercial programmers encompassed by this provision.

51. We note that subsection (b) of Section 25 assumes that noncommercial program suppliers will lease reserved channels from DBS providers. This type of arrangement, however, may not be the only way in which such channels are provided. For example, DBS providers may pay a program supplier for the use of its programming or may undertake various promotional activities in exchange for other consideration. We seek comment on the extent to which contractual arrangements, including rate agreements, under which programming comporting with the definitions of this provision is delivered, should be acceptable if mutually agreed to and whether programming so delivered can be counted toward fulfilling the DBS service provider's obligations under this section.

V. ADMINISTRATIVE MATTERS

A. Regulatory Flexibility Analysis

52. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an initial regulatory flexibility analysis (IRFA) of the expected impact of these proposed policies and rules on small entities. The IRFA is set forth in Appendix A. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same deadlines as comments on the other sections of this *Notice of Proposed Rule Making*. However, such comments must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis. The Secretary shall cause a copy of this *Notice of Proposed Rule Making* and regulatory flexibility analysis to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

B. Ex Parte

53. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's rules. *See generally* 47 C.F.R. Sections 1.1202, 1.203. and 1.206(a).

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[51] 1992 Cable Act, Section 25(4)(C).
[52] *House Report* at 125.

C. Comments

54. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before **May 24, 1993,** and reply comments on or before **June 30, 1993.** To file formally in this proceeding, you must fileh)4an original plus four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 239, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

D. Additional Information

55. For additional information on this proceeding, contact Andrew J. Rhodes, Mass Media Bureau, (202) 632-5414, or Rosalee Chiara, Common Carrier Bureau, (202) 634-1781.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Initial Regulatory Flexibility Analysis

Pursuant to the Regulatory Flexibility Act of 1980, the Commission finds:

I. *Reason for action:* This action is taken to implement Section 25 of the Cable Television Consumer Protection and Competition Act of 1992 which requires the Commission to adopt public service obligations for providers of direct broadcast satellite ("DBS") service providing video programming.

II. *Objective of this Action:* This action has three objectives. First, the *Notice* proposes to apply the political broadcasting requirements of Sections 312(a)(7) and 315 of the Communications Act to DBS service providers and to consider whether any other public interest requirements should also be imposed. Second, the *Notice* seeks to compile a record on whether a national mode of broadcasting such as DBS can accomplish the Commission's long standing goal of service to individual communities by beaming programming to local or regional areas. Third, the *Notice* solicits comments on requiring DBS service providers to reserve between 4% and 7% of their total channel capacity for noncommercial, educational and informational programming and to make this channel capacity available to national educational programming suppliers upon reasonable prices, terms, and conditions as determined by the Commission.

III. *Legal Basis:* Authority for the actions proposed in this *Notice* may be found in Sections 4(i) and (j) and 303 of the Communications Act of 1934, as amended, and the Cable Television Consumer Protection and Competition Act of 1992.

IV. *Reporting, Recordkeeping, and Other Compliance Requirements:* Application of the political broadcasting requirements of Sections 312(a)(7) and 315 of the Communications Act would necessitate that DBS service providers maintain and permit public inspection of a complete record of all requests for broadcast time, the dispositions made of such requests, and the charges, if any, made for the time. With request to the carriage obligations for noncommercial, educational and informational programming, DBS service providers would have to process and authorize requests for use of the reserved channel capacity at reasonable rates as determined in this rulemaking proceeding.

V. *Federal Rules which Overlap, Duplicate, or Conflict with the Proposed Rule:* None.

VI. *Description, Potential Impact and Number of Small Entities Involved:* There are 9 entities that have construction permits for high-powered DBS satellite systems under Part 100 of the Commission's Rules that would become subject to these public interest obligations when they commence broadcasting. Other DBS systems under Part 25 of the Commission's Rules may also be subject to these public interest requirements, but at the present time we are aware of only one company -- which is a joint venture of various owners of multiple cable systems -- that is providing direct-to-home programming by satellite. The potential impact of applying the political broadcasting requirements to these entities is that they would have to sell air time at their lowest unit charge to federal candidates and to other types of candidates that they permit on the air. The potential impact of the carriage obligations for noncommercial programming is that, under Section 25(b) of the 1992 Cable Act, DBS service providers may not charge more than 50% of the "direct" costs of making a reserved channel available. This would presumably result in a loss on the use of these reserved channels. In addition, an unknown number of small entities such as public television stations and public or private educational institutions would have the opportunity to purchase time at a reasonable rates for the broadcasting of noncommercial educational and informational programming.

VII. *Any Significant Alternatives Minimizing the Impact on Small Entities and Consistent with the Stated Objectives:* There are no alternatives with respect to the proposals to apply the political broadcasting rules or to establish carriage obligations for noncommercial educational and informational programming that would minimize the impact on small entities. However, with respect to the possibility of adopting other public interest requirements or considering how DBS systems could promote localism, there is an additional option -- that is, not to adopt regulations at this time but reserve the right to do so in the future if circumstances so warrant.

Before the
Federal Communications Commission
Washington, D.C. 20554

In Re

TNI Associates File No. 316MS0009

Notice of Apparent Liability for
Forfeiture Penalty for Station
KNKM732 in the Public Land Mobile
Service at Falls Church, Virginia

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: February 18, 1993; Released: March 1, 1993

By the Chief, Mobile Services Division:

1. On September 9, 1991, the Commission granted an authorization to TNI Associates (TNI) to operate on frequency 494.2125 MHz at Falls Church, Virginia. The expiration date of the authorization was September 9, 1992. On September 23, 1992, TNI filed FCC Form 489, Notification of Status of Facilities, requesting reinstatement. The FCC Form 489 included a statement notifying the Commission that construction had been completed and operation had commenced.

2. Section 22.9(b)(1) of the Commission's Rules states:

> *Notification of status of facilities.* (FCC Form 489). When construction has been completed in accordance with the radio station authorization, the licensee shall so notify the Commission using Form 489. Licensees can commence service the day Form 489 is placed in the mail to the FCC.

Therefore, because TNI commenced operation without timely filing FCC Form 489 with the Commission, it is in apparent violation of Section 22.9(b)(1).

3. Section 503(b) of the Communications Act states in pertinent part:

> Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection, to have--
>
> (B) willfully or repeatedly failed to comply with any of the provisions of this chapter or of any rule, regulation, or order issued by the Commission under this chapter...shall be liable to the United States for a forfeiture penalty.

We find that TNI's failure to file a Form 489 until September 23, 1992, constitutes willful and repeated conduct within the terms of the statute.[1]

4. Pursuant to our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991) *(Policy Statement), recon. denied*, 7 FCC Rcd 5339 (1992), *petition for review pending sub nom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992), the base forfeiture amount for failing to file required forms is $30,000. The forfeiture is being adjusted downward by $15,000 because failing to file an FCC Form 489 is a relatively minor violation, and by an additional $9,000 because TNI voluntarily disclosed its failure to file the FCC Form 489. Consequently, a $6,000 forfeiture is assessed.

5. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. Section 503(b) and Section 1.80 of the Commission's Rules, 47 C.F.R. Sec. 1.80, IT IS ORDERED that TNI Associates IS APPARENTLY LIABLE FOR A FORFEITURE in the amount of Six Thousand Dollars ($6,000) for willful and repeated violations of the aforementioned rule. The amount specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934, as amended.

6. Payment of the forfeiture may be made by mailing a check or similar instrument, noting on the payment the File Number of the above captioned proceeding, to the Commission within thirty (30) days of the release date of this order, payable to the order of the Federal Communications Commission to: Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482.

7. A copy of this Notice is being sent to TNI Associates, 3088 State Highway 27, Kendall Park, New Jersey 08824, by Certified Mail, Return Receipt Requested.

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[1] Section 312(f)(1) of the Communications Act provides:

> The term "willful", when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States.

This definition applies to Section 503(b) of the Communications Act. *See Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

Section 312(f)(2) of the Communications Act provides:

> The term "repeated", when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.

This definition applies to Section 503(b) as well. *See* H. R. Rep. No. 97-765, 97th Cong. 2d Sess. 50-51 (1982).

FEDERAL COMMUNICATIONS COMMISSION

John Cimko
Chief, Mobile Service Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COLUMBIA COMMUNICATIONS CORPORATION — File No. CSS-86-002-LA

Request for One-Year Extension of Time to Demonstrate Permanent Financial Qualifications to Construct and Operate International Satellite Communications Systems

MEMORANDUM OPINION AND ORDER

Adopted: February 23, 1993; Released: March 2, 1993

By the Deputy Chief, Common Carrier Bureau

1. Columbia Communications Corporation (Columbia) is holder of a conditional authorization to construct, launch and operate a private satellite system providing international communications services. This system is to be comprised of one in-orbit satellite in the Pacific Ocean Region (165^0 W.L.).

2. On March 28, 1990, Columbia filed a request with the Commission for a one-year extension of the time limit set for demonstrating permanent financial qualifications for construction, launch and operation of its conditionally authorized system. In its request, Columbia alleged that it continues to exercise due diligence in its efforts to implement the system. No comments were received concerning the request.

3. On October 30, 1992, the Chief, Common Carrier Bureau, informed Columbia that its request failed to provide information with the specificity necessary for the Commission to make a reasoned determination granting or denying the request. Accordingly, the Bureau required, pursuant to 47 C.F.R. Section 1.17, that Columbia file with the Commission within 30 days certain specific information to supplement its request. The Bureau stated that failure to respond within 30 days would be treated as failure to prosecute, resulting in denial of the application.

4. The Bureau's letter stated that the affidavit must include a record, including dates, places and names of contacts, of significant written correspondence and meetings concerning Columbia's efforts in obtaining financing, operating agreements and customers for the satellite at 165^0 W.L.. The Bureau also required that the affidavit include a credible business plan to ensure launch and operation of that satellite by a date certain.

5. Columbia filed an affidavit on November 30, 1992 with a request that the materials be withheld from public inspection pursuant to Sections 0.457(d) and 0.459 of the Commission's Rules on the basis that they contain confidential and proprietary financial and commercial information. This affidavit contains 64 exhibits referring to specific actions that Columbia has undertaken pursuant to its current conditional authorization. These exhibits focus on Columbia's efforts to use and finance its leased C-band capacity on the NASA TDRSS satellites located at 41^0 W.L. in the Atlantic Ocean Region and 174^0 W.L. in the Pacific Ocean Region as well as the satellite conditionally authorized at 165^0 W.L.. The exhibits show a substantial effort by Columbia in obtaining operating agreements, customers and a certain level of financing for all of its proposed operations.

6. We find that Columbia's affidavit does comply with the minimum requirements stated in the Bureau letter, and provides a sufficient basis to support the grant of an extension of time for one year from the release date of this order to demonstrate permanent financial qualifications. Further, based upon the representations in the affidavit, we anticipate that this will be the last request for an extension that we will grant.

7. Accordingly, IT IS ORDERED that the request of Columbia for a one-year extension of time from the release date of this order to demonstrate permanent financial qualifications pursuant to the terms of its conditional authorization (Memorandum Opinion, Order and Authorization, 1 FCC Rcd 1202 (1986)) IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 19, 1993

FEE DECISIONS OF THE MANAGING DIRECTOR AVAILABLE TO THE PUBLIC

The Managing Director is responsible for fee decisions in response to requests for waiver or deferral of fees as well as other pleadings associated with the fee collection process. On a monthly basis, a public notice is released and the entire text of these fee decisions is published in the FCC Record.

The decisions are placed in General Docket 86-285 and are available for public inspection. A copy of the decision is also placed in the appropriate docket, if one exists.

The following Managing Director fee decisions are released for public information:

Broad Spectrum Communications, Inc. - Request for refund of a hearing fee for a new FM station at Chico, California - **Granted** (February 11, 1993).

Hitt, Diane K. - Request for refund of a hearing fee for a new FM station at Rosamond, California - **Granted** (January 28, 1993).

Ninety-Two Seven, Ltd. - Request for refund of a hearing fee for a new FM station at Chico, California - **Granted** (February 1, 1993).

Ocean Communications - Request for refund of a filing fee for an FM station at Ocean City, New Jersey - **Denied** (January 28, 1993).

Omega Broadcasting Corporation - Request for reinstatement, nunc pro tunc of an application to increase the tower height of a station at LaBelle, Florida - **Granted** (January 28, 1993).

Phoenix Broadcasting, Inc. - Request for refund of a hearing fee for a new FM station at Chico, California - **Granted** (February 11, 1993).

Rappahannock Communications Group, Inc. - Request for waiver of filing fee for an extension of a construction permit - **Granted** (February 11, 1993).

Ruark, Craig - Request for reinstatement, nunc pro tunc of an application for five new LPTV stations at Hobbs, New Mexico - **Denied** (December 31, 1992).

Ruark, Dana - Request for reinstatement, nunc pro tunc of an application for five new LPTV stations at Midland, Texas - **Denied** (January 25, 1993).

Southern Communications, Inc. - Request for refund of the filing fee submitted with application to upgrade a station in Charleston, South Carolina - **Denied** (February 11, 1993).

Sunshine Beeper Company - Request for a refund of the application with its request for special temporary authority - **Denied** (January 25, 1993).

NOTE: ANY QUESTIONS REGARDING THIS REPORT SHOULD BE DIRECTED TO THE PREPARER, CLAUDETTE PRIDE, CHIEF, FEE SECTION ON (202) 632-0241.

FEDERAL COMMUNICATIONS COMMISSION

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

FEB 11 1993

Margaret L. Tobey, Esq.
Akin, Gump, Hauer
& Feld, L.L.P.
1333 New Hampshire, N.W.
Suite 400
Washington, D.C. 20036

Dennis Kelly, Esq.
Cordon & Kelly
Post Office Box 6648
Annapolis, MD 21401

Donald E. Martin, P.C.
2000 L Street, N.W.
Suite 200
Washington, D.C. 20036

Dear Ms. Tobey and Messrs. Kelly and Martin:

This will respond to your joint request for refunds of the three hearing fees filed on behalf of Broad Spectrum Communications, Inc. ("BSCI"), Phoenix Broadcasting, Inc. ("Phoenix"), and Ninety-Two Seven, Ltd. ("NTSL"), respectively, in connection with their competing construction permit applications for a new FM station at Chico, California.

You state that prior to the Notice of Appearance deadline, BSCI, Phoenix and NTSL filed a settlement agreement that reflected their merger. The merger has been approved, the contingent environmental issue has been deleted, and the merged application has been granted without hearing. See Memorandum Opinion and Order, FCC 92M-1045 (November 17, 1992).

Section 1.1111(c)(4) of the Commission's rules provides for refund of a hearing fee whenever applications are withdrawn pursuant to a settlement agreement, prior to the Notice of Appearance deadline, and the remaining application is immediately grantable. Under the circumstances, refund of the hearing fees is appropriate.

Accordingly, your request is granted. Checks on behalf of BSCI and Phoenix, made payable to the makers of the original checks and drawn in the amount of $6,760.00 each, will be sent to the respective attorneys at the earliest practicable time. NTSL's had previously filed a separate refund request, which has already been granted. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JAN 28 1993

John F. Garziglia, Esquire
Pepper & Corazzini
200 Montgomery Building
1776 K Street, N.W.
Washington, D.C. 20006

Dear Mr. Garziglia:

This is in response to your request for refund of the hearing fee submitted by Ms. Diane K. Hitt, former applicant for a new FM station at Rosamond, California.

You state that Ms. Hitt is entitled to a refund because she and the competing applicants for the station at Rosamond timely filed a settlement agreement with the presiding Administrative Law Judge providing for award of the station authorization to one applicant and dismissal of the remaining applicants, including Ms. Hitt. The ALJ approved the settlement agreement, and granted the surviving application following summary judgment on an outstanding issue.

Section 1.1111(b)(4) of the Commission's rules provides that a hearing fee is not required when the competing applicants timely file a settlement agreement. 47 C.F.R. § 1.1111(b)(4). Even if the surviving application in a settlement agreement contains an outstanding issue subject to adjudication, a fee will be required only from the surviving applicant. See Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985, 2 FCC Rcd 947 (1987), recon. in part, 3 FCC Rcd 5987, 5990 (1988). Therefore, since no hearing fee payment was due from the applicants dismissed under the settlement agreement, the fee submitted by Ms. Hitt will be returned.

Accordingly, your request is granted.

A check, made payable to the maker of the original check and drawn in the amount of $6,760.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

FEB 1 1993

Donald E. Martin, P.C.
2000 L Street, N.W.
Suite 200
Washington, D.C. 20036

Dear Mr. Martin:

This will respond to your request for refund of a hearing fee filed on behalf of Ninety-Two Seven, Ltd. ("NTSL") in connection with its construction permit application for a new FM station at Chico, California.

You state that prior to the Notice of Appearance deadline, NTSL filed a settlement agreement that reflected its merger with several of its competing applicants. The merger has been approved, the contingent environmental issue has been deleted, and the merged application has been granted without hearing. See Memorandum Opinion and Order, FCC 92M-1045 (November 17, 1992).

Section 1.1111(c)(4) of the Commission's rules provides for refund of a hearing fee whenever applications are withdrawn pursuant to a settlement agreement, prior to the Notice of Appearance deadline, and the remaining application is immediately grantable. Under the circumstances, refund of NTSL's hearing fee is appropriate.

Accordingly, your request is granted. A check, made payable to the maker of the original check and drawn in the amount of $6,760.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JAN 28 1993

Ocean Communications
c/o Steven L. Sinn
125 State Street, Suite 100
Hackensack, New Jersey 07601

Dear Mr. Sinn:

This will respond to your request for refund of the filing fee submitted on behalf of Ocean Communications, licensee of WKOE(FM) station in Ocean City, New Jersey, in connection with its second request to change its call sign. You state that Ocean Communication submitted a second request for a call sign change because its previously requested call sign was denied for unavailability. You contend that Ocean Communications was not required to file a second request with the appropriate fee, but merely had to ask for another call sign.

Section 1.1111(a)(1) of the Commission's rules provides for refund of a processing fee when the particular filing does not require a fee. Section 1.1104(1)(g), without exception, establishes that each filing that requests a change in call sign must be accompanied by a $55.00 fee. Pursuant to Section 73.3550(a), Ocean Communications could have specified up to five call sign choices in order of preference in its initial request to change its call sign. However, because Ocean Communications filed separate requests, it also was required to submit the appropriate fees with each filing. Thus, under the circumstances, refund of the filing fee is inappropriate.

Based on the foregoing, your request for a filing fee refund is denied.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JAN 28 1993

Robert J. Miller
President
Omega Broadcasting Corporation
6335 Riverview Lane
Dallas, Texas 75248

Dear Mr. Miller:

This is in response to your request for reinstatement, nunc pro tunc, of an application filed by Omega Broadcasting Corporation (Omega) to increase the tower height of station WKZY-FM, LaBelle, Florida.

Omega's application was returned because its bank refused to honor its fee payment due to insufficient funds. However, you state that sufficient funds were available in Omega's account to cover the fee. You enclose a notarized statement from a bank official supporting your contention and stating that payment was refused due to bank error. See statement of Ms. Kelly J. Ard, Banking Center Manager, NationsBank of Texas, N.A., dated November 17, 1992.

Full and proper fee payments must accompany applications and other filings at the time of their filing with the Commission. 47 C.F.R. § 1.1108. However, in the case of a defective fee payment, an application will be reinstated based upon a convincing showing, including a statement by a bank official, that failure to honor the check was entirely due to an error on the part of the bank. See 47 C.F.R. § 1.1114(a)(2); see also Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989, 2 FCC Rcd 947 (1987), recon. in part, 3 FCC Rcd 5987, 5992 (1988).

Accordingly, your request for reinstatement, nunc pro tunc, is granted.

A copy of this letter should accompany the resubmission of Omega's application.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

FEB 11 1993

Margaret L. Tobey, Esq.
Akin, Gump, Hauer
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1333 New Hampshire, N.W.
Suite 400
Washington, D.C. 20036

Dennis Kelly, Esq.
Cordon & Kelly
Post Office Box 6648
Annapolis, MD 21401

Donald E. Martin, P.C.
2000 L Street, N.W.
Suite 200
Washington, D.C. 20036

Dear Ms. Tobey and Messrs. Kelly and Martin:

This will respond to your joint request for refunds of the three hearing fees filed on behalf of Broad Spectrum Communications, Inc. ("BSCI"), Phoenix Broadcasting, Inc. ("Phoenix"), and Ninety-Two Seven, Ltd. ("NTSL"), respectively, in connection with their competing construction permit applications for a new FM station at Chico, California.

You state that prior to the Notice of Appearance deadline, BSCI, Phoenix and NTSL filed a settlement agreement that reflected their merger. The merger has been approved, the contingent environmental issue has been deleted, and the merged application has been granted without hearing. See Memorandum Opinion and Order, FCC 92M-1045 (November 17, 1992).

Section 1.1111(c)(4) of the Commission's rules provides for refund of a hearing fee whenever applications are withdrawn pursuant to a settlement agreement, prior to the Notice of Appearance deadline, and the remaining application is immediately grantable. Under the circumstances, refund of the hearing fees is appropriate.

Accordingly, your request is granted. Checks on behalf of BSCI and Phoenix, made payable to the makers of the original checks and drawn in the amount of $6,760.00 each, will be sent to the respective attorneys at the earliest practicable time. NTSL's had previously filed a separate refund request, which has already been granted. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

FEB 11 1993

David M. Hunsaker, Esq.
Putbrese, Hunsaker & Ruddy
6800 Fleetwood Road
McLean House, Suite 100
P.O. Box 539
McLean, Virginia 22101

Dear Mr. Hunsaker:

This will respond to your request for waiver of the filing fee submitted on behalf of Rappahannock Communications Group, Inc. ("RCGI"), permittee of WLMN (FM), Bowling Green, Virginia in connection with its application for extension of its construction permit. You state, and your documentation demonstrates, that RCGI's permit was conditioned upon the final outcome of a allotment proceeding, which proposed coordinates that conflicted with those specified by RCGI. RCGI has sought to protect its application by participating, and proposing an alternative site, in the allotment proceeding. However, given the fact that the allotment proceeding is still pending, RCGI has been precluded from initiating construction.

The Commission may waive filing fees only upon a showing of good cause and a finding that the public interest will be served thereby. See Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985, 2 FCC Rcd 947, 961 (1987); see also 47 C.F.R. §§1.1111(a)(5) and 1.1115. We have determined that RCGI has demonstrated good cause for waiver of the filing fees. RCGI is willing and able to commence construction, but precluded from doing so due to the pendency of the conflicting allotment proceeding. Moreover, we have concluded that the public interest in ultimately eliminating conflicts between coordinates specified by applicants and those proposed by rulemaking proponents will be further served by granting RCGI's waiver request.

Accordingly, your request for a waiver of the filing fee is granted. A check made payable to the maker of the original check and drawn in the amount of $200.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

DEC 3 1 1992

Richard L. Vega, Jr., President
Phase One Communications, Inc.
3452 Lake Lynda Drive, Suite 115
Orlando, FL 32817

Dear Mr. Vega:

This is in response to your request for reinstatement, nunc pro tunc, of an application filed by Craig Ruark for a new LPTV station at Hobbs, New Mexico (ch. 21, File No. BPTTL-920214XI).

Ruark's application was returned because the check that was submitted to cover the application fee was post-dated and, therefore, unacceptable as a fee payment. You state that an erroneous date was entered on the post-dated check inadvertently. Moreover, you have enclosed a letter from Ruark's bank stating that it would honor the check, notwithstanding the erroneous date. Finally, you contend that acceptance of the Ruark application will facilitate provision of community-originated programming.

Section 8 of the Communications Act provides that the Commission may dismiss any application for failure to pay a fee "in a timely manner." 47 U.S.C. 158(c)(2). In this regard, the Commission decided that "all fees will be due in full upon submission of an application." See Establishment of A Fee Collection Program, 2 FCC Rcd 947, 954, recon. denied, 3 FCC Rcd 5987 (1988). A post-dated check is not payable until the stated date, Uniform Commercial Code 3-114(2), and, prior to the stated date it is not a "check" for purposes of the Uniform Commercial Code as it is not payable on demand. Allied Color Corp. v. Manufacturers Hanover Trust Co., 484 F. Supp. 881 (S.D.N.Y. 1980). Thus, submission of a post-dated check does not satisfy the Commission's requirement that the fee be paid with the submission of the application.

Similarly, an attempt to negotiate the Ruark post-dated check before it was due would not be in conformance with normal banking procedures. We recognize that a paying bank, like Ruark's bank has now indicated, may honor a post-dated check under a private agreement with its customer. However, the Commission has determined that it will not undertake to mitigate an applicant's failure to make timely payment of a fee by attempting to negotiate a payment instrument before the date thereon and will not reinstate an application returned due to payment deficiencies because of the administrative costs attendant to such efforts.

Finally, we are satisfied that there is sufficient public interest in the Commission's consistent application of its fee requirements

to override any temporary delay in the provision of service that adherence to the fee rules may require.

Accordingly, your request is denied. A check in the amount of $425 and made payable to the maker of the original check, will be sent to you at the earliest practicable time.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

DEC 3 1 1992

OFFICE OF
MANAGING DIRECTOR

Richard L. Vega, Jr., President
Phase One Communications, Inc.
3452 Lake Lynda Drive, Suite 115
Orlando, FL 32817

Dear Mr. Vega:

This is in response to your request for reinstatement, nunc pro tunc, of an application filed by Craig Ruark for a new LPTV station at Hobbs, New Mexico (ch. 63, File No. BPTTL-920214XJ).

Ruark's application was returned because the check that was submitted to cover the application fee was post-dated and, therefore, unacceptable as a fee payment. You state that an erroneous date was entered on the post-dated check inadvertently. Moreover, you have enclosed a letter from Ruark's bank stating that it would honor the check, notwithstanding the erroneous date. Finally, you contend that acceptance of the Ruark application will facilitate provision of community-originated programming.

Section 8 of the Communications Act provides that the Commission may dismiss any application for failure to pay a fee "in a timely manner." 47 U.S.C. 158(c)(2). In this regard, the Commission decided that "all fees will be due in full upon submission of an application." See Establishment of A Fee Collection Program, 2 FCC Rcd 947, 954, recon. denied, 3 FCC Rcd 5987 (1988). A post-dated check is not payable until the stated date, Uniform Commercial Code 3-114(2), and, prior to the stated date it is not a "check" for purposes of the Uniform Commercial Code as it is not payable on demand. Allied Color Corp. v. Manufacturers Hanover Trust Co., 484 F. Supp. 881 (S.D.N.Y. 1980). Thus, submission of a post-dated check does not satisfy the Commission's requirement that the fee be paid with the submission of the application.

Similarly, an attempt to negotiate the Ruark post-dated check before it was due would not be in conformance with normal banking procedures. We recognize that a paying bank, like Ruark's bank has now indicated, may honor a post-dated check under a private agreement with its customer. However, the Commission has determined that it will not undertake to mitigate an applicant's failure to make timely payment of a fee by attempting to negotiate a payment instrument before the date thereon and will not reinstate an application returned due to payment deficiencies because of the administrative costs attendant to such efforts.

Finally, we are satisfied that there is sufficient public interest in the Commission's consistent application of its fee requirements

to override any temporary delay in the provision of service that adherence to the fee rules may require.

Accordingly, your request is denied. A check in the amount of $425 and made payable to the maker of the original check, will be sent to you at the earliest practicable time.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

DEC 3 1 1992

Richard L. Vega, Jr., President
Phase One Communications, Inc.
3452 Lake Lynda Drive, Suite 115
Orlando, FL 32817

Dear Mr. Vega:

This is in response to your request for reinstatement, nunc pro tunc, of an application filed by Craig Ruark for a new LPTV station at Hobbs, New Mexico (ch. 50, File No. BPTTL-920214XK).

Ruark's application was returned because the check that was submitted to cover the application fee was post-dated and, therefore, unacceptable as a fee payment. You state that an erroneous date was entered on the post-dated check inadvertently. Moreover, you have enclosed a letter from Ruark's bank stating that it would honor the check, notwithstanding the erroneous date. Finally, you contend that acceptance of the Ruark application will facilitate provision of community-originated programming.

Section 8 of the Communications Act provides that the Commission may dismiss any application for failure to pay a fee "in a timely manner." 47 U.S.C. 158(c)(2). In this regard, the Commission decided that "all fees will be due in full upon submission of an application." See Establishment of A Fee Collection Program, 2 FCC Rcd 947, 954, recon. denied, 3 FCC Rcd 5987 (1988). A post-dated check is not payable until the stated date, Uniform Commercial Code 3-114(2), and, prior to the stated date it is not a "check" for purposes of the Uniform Commercial Code as it is not payable on demand. Allied Color Corp. v. Manufacturers Hanover Trust Co., 484 F. Supp. 881 (S.D.N.Y. 1980). Thus, submission of a post-dated check does not satisfy the Commission's requirement that the fee be paid with the submission of the application.

Similarly, an attempt to negotiate the Ruark post-dated check before it was due would not be in conformance with normal banking procedures. We recognize that a paying bank, like Ruark's bank has now indicated, may honor a post-dated check under a private agreement with its customer. However, the Commission has determined that it will not undertake to mitigate an applicant's failure to make timely payment of a fee by attempting to negotiate a payment instrument before the date thereon and will not reinstate an application returned due to payment deficiencies because of the administrative costs attendant to such efforts.

Finally, we are satisfied that there is sufficient public interest in the Commission's consistent application of its fee requirements

to override any temporary delay in the provision of service that adherence to the fee rules may require.

Accordingly, your request is denied. A check in the amount of $425 and made payable to the maker of the original check, will be sent to you at the earliest practicable time.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

DEC 3 1 1992

OFFICE OF
MANAGING DIRECTOR

Richard L. Vega, Jr., President
Phase One Communications, Inc.
3452 Lake Lynda Drive, Suite 115
Orlando, FL 32817

Dear Mr. Vega:

This is in response to your request for reinstatement, nunc pro tunc, of an application filed by Craig Ruark for a new LPTV station at Hobbs, New Mexico (ch. 39, File No. BPTTL-920214XL).

Ruark's application was returned because the check that was submitted to cover the application fee was post-dated and, therefore, unacceptable as a fee payment. You state that an erroneous date was entered on the post-dated check inadvertently. Moreover, you have enclosed a letter from Ruark's bank stating that it would honor the check, notwithstanding the erroneous date. Finally, you contend that acceptance of the Ruark application will facilitate provision of community-originated programming.

Section 8 of the Communications Act provides that the Commission may dismiss any application for failure to pay a fee "in a timely manner." 47 U.S.C. 158(c)(2). In this regard, the Commission decided that "all fees will be due in full upon submission of an application." See Establishment of A Fee Collection Program, 2 FCC Rcd 947, 954, recon. denied, 3 FCC Rcd 5987 (1988). A post-dated check is not payable until the stated date, Uniform Commercial Code 3-114(2), and, prior to the stated date it is not a "check" for purposes of the Uniform Commercial Code as it is not payable on demand. Allied Color Corp. v. Manufacturers Hanover Trust Co., 484 F. Supp. 881 (S.D.N.Y. 1980). Thus, submission of a post-dated check does not satisfy the Commission's requirement that the fee be paid with the submission of the application.

Similarly, an attempt to negotiate the Ruark post-dated check before it was due would not be in conformance with normal banking procedures. We recognize that a paying bank, like Ruark's bank has now indicated, may honor a post-dated check under a private agreement with its customer. However, the Commission has determined that it will not undertake to mitigate an applicant's failure to make timely payment of a fee by attempting to negotiate a payment instrument before the date thereon and will not reinstate an application returned due to payment deficiencies because of the administrative costs attendant to such efforts.

Finally, we are satisfied that there is sufficient public interest in the Commission's consistent application of its fee requirements

to override any temporary delay in the provision of service that adherence to the fee rules may require.

Accordingly, your request is denied. A check in the amount of $425 and made payable to the maker of the original check, will be sent to you at the earliest practicable time.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

DEC 3 1 1992

Richard L. Vega, Jr., President
Phase One Communications, Inc.
3452 Lake Lynda Drive, Suite 115
Orlando, FL 32817

Dear Mr. Vega:

This is in response to your request for reinstatement, nunc pro tunc, of an application filed by Craig Ruark for a new LPTV station at Hobbs, New Mexico (ch. 23, File No. BPTTL-920214XM).

Ruark's application was returned because the check that was submitted to cover the application fee was post-dated and, therefore, unacceptable as a fee payment. You state that an erroneous date was entered on the post-dated check inadvertently. Moreover, you have enclosed a letter from Ruark's bank stating that it would honor the check, notwithstanding the erroneous date. Finally, you contend that acceptance of the Ruark application will facilitate provision of community-originated programming.

Section 8 of the Communications Act provides that the Commission may dismiss any application for failure to pay a fee "in a timely manner." 47 U.S.C. 158(c)(2). In this regard, the Commission decided that "all fees will be due in full upon submission of an application." See Establishment of A Fee Collection Program, 2 FCC Rcd 947, 954, recon. denied, 3 FCC Rcd 5987 (1988). A post-dated check is not payable until the stated date, Uniform Commercial Code 3-114(2), and, prior to the stated date it is not a "check" for purposes of the Uniform Commercial Code as it is not payable on demand. Allied Color Corp. v. Manufacturers Hanover Trust Co., 484 F. Supp. 881 (S.D.N.Y. 1980). Thus, submission of a post-dated check does not satisfy the Commission's requirement that the fee be paid with the submission of the application.

Similarly, an attempt to negotiate the Ruark post-dated check before it was due would not be in conformance with normal banking procedures. We recognize that a paying bank, like Ruark's bank has now indicated, may honor a post-dated check under a private agreement with its customer. However, the Commission has determined that it will not undertake to mitigate an applicant's failure to make timely payment of a fee by attempting to negotiate a payment instrument before the date thereon and will not reinstate an application returned due to payment deficiencies because of the administrative costs attendant to such efforts.

Finally, we are satisfied that there is sufficient public interest in the Commission's consistent application of its fee requirements

to override any temporary delay in the provision of service that adherence to the fee rules may require.

Accordingly, your request is denied. A check in the amount of $425 and made payable to the maker of the original check, will be sent to you at the earliest practicable time.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

DEC 3 1 1992

Richard L. Vega, Jr., President
Phase One Communications, Inc.
3452 Lake Lynda Drive, Suite 115
Orlando, FL 32817

Dear Mr. Vega:

This is in response to your request for reinstatement, nunc pro tunc, of an application filed by Dana Ruark for a new LPTV station at Midland, Texas (ch. 58).

Ruark's application was returned because the check that was submitted to cover the application fee was post-dated and, therefore, unacceptable as a fee payment. You state that an erroneous date was entered on the post-dated check inadvertently. Moreover, you have enclosed a letter from Ruark's bank stating that it would honor the check, notwithstanding the erroneous date. Finally, you contend that acceptance of the Ruark application will facilitate provision of community-originated programming.

Section 8 of the Communications Act provides that the Commission may dismiss any application for failure to pay a fee "in a timely manner." 47 U.S.C. 158(c)(2). In this regard, the Commission decided that "all fees will be due in full upon submission of an application." See Establishment of A Fee Collection Program, 2 FCC Rcd 947, 954, recon. denied, 3 FCC Rcd 5987 (1988). A post-dated check is not payable until the stated date, Uniform Commercial Code 3-114(2), and, prior to the stated date it is not a "check" for purposes of the Uniform Commercial Code as it is not payable on demand. Allied Color Corp. v. Manufacturers Hanover Trust Co., 484 F. Supp. 881 (S.D.N.Y. 1980). Thus, submission of a post-dated check does not satisfy the Commission's requirement that the fee be paid with the submission of the application.

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Finally, we are satisfied that there is sufficient public interest in the Commission's consistent application of its fee requirements

to override any temporary delay in the provision of service that adherence to the fee rules may require.

Accordingly, your request is denied. A check in the amount of $425 and made payable to the maker of the original check, will be sent to you at the earliest practicable time.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

DEC 3 1 1992

Richard L. Vega, Jr., President
Phase One Communications, Inc.
3452 Lake Lynda Drive, Suite 115
Orlando, FL 32817

Dear Mr. Vega:

This is in response to your request for reinstatement, nunc pro tunc, of an application filed by Dana Ruark for a new LPTV station at Midland, Texas (ch. 28, File No. BPTTL-920214XN).

Ruark's application was returned because the check that was submitted to cover the application fee was post-dated and, therefore, unacceptable as a fee payment. You state that an erroneous date was entered on the post-dated check inadvertently. Moreover, you have enclosed a letter from Ruark's bank stating that it would honor the check, notwithstanding the erroneous date. Finally, you contend that acceptance of the Ruark application will facilitate provision of community-originated programming.

Section 8 of the Communications Act provides that the Commission may dismiss any application for failure to pay a fee "in a timely manner." 47 U.S.C. 158(c)(2). In this regard, the Commission decided that "all fees will be due in full upon submission of an application." See Establishment of A Fee Collection Program, 2 FCC Rcd 947, 954, recon. denied, 3 FCC Rcd 5987 (1988). A post-dated check is not payable until the stated date, Uniform Commercial Code 3-114(2), and, prior to the stated date it is not a "check" for purposes of the Uniform Commercial Code as it is not payable on demand. Allied Color Corp. v. Manufacturers Hanover Trust Co., 484 F. Supp. 881 (S.D.N.Y. 1980). Thus, submission of a post-dated check does not satisfy the Commission's requirement that the fee be paid with the submission of the application.

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Finally, we are satisfied that there is sufficient public interest in the Commission's consistent application of its fee requirements

to override any temporary delay in the provision of service that adherence to the fee rules may require.

Accordingly, your request is denied. A check in the amount of $425 and made payable to the maker of the original check, will be sent to you at the earliest practicable time.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

DEC 31 1992

Richard L. Vega, Jr., President
Phase One Communications, Inc.
3452 Lake Lynda Drive, Suite 115
Orlando, FL 32817

Dear Mr. Vega:

This is in response to your request for reinstatement, nunc pro tunc, of an application filed by Dana Ruark for a new LPTV station at Midland, Texas (ch. 69, File No. BPTTL-920214XR).

Ruark's application was returned because the check that was submitted to cover the application fee was post-dated and, therefore, unacceptable as a fee payment. You state that an erroneous date was entered on the post-dated check inadvertently. Moreover, you have enclosed a letter from Ruark's bank stating that it would honor the check, notwithstanding the erroneous date. Finally, you contend that acceptance of the Ruark application will facilitate provision of community-originated programming.

Section 8 of the Communications Act provides that the Commission may dismiss any application for failure to pay a fee "in a timely manner." 47 U.S.C. 158(c)(2). In this regard, the Commission decided that "all fees will be due in full upon submission of an application." See Establishment of A Fee Collection Program, 2 FCC Rcd 947, 954, recon. denied, 3 FCC Rcd 5987 (1988). A post-dated check is not payable until the stated date, Uniform Commercial Code 3-114(2), and, prior to the stated date it is not a "check" for purposes of the Uniform Commercial Code as it is not payable on demand. Allied Color Corp. v. Manufacturers Hanover Trust Co., 484 F. Supp. 881 (S.D.N.Y. 1980). Thus, submission of a post-dated check does not satisfy the Commission's requirement that the fee be paid with the submission of the application.

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Finally, we are satisfied that there is sufficient public interest in the Commission's consistent application of its fee requirements

to override any temporary delay in the provision of service that adherence to the fee rules may require.

Accordingly, your request is denied. A check in the amount of $425 and made payable to the maker of the original check, will be sent to you at the earliest practicable time.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

DEC 3 1 1992

Richard L. Vega, Jr., President
Phase One Communications, Inc.
3452 Lake Lynda Drive, Suite 115
Orlando, FL 32817

Dear Mr. Vega:

This is in response to your request for reinstatement, nunc pro tunc, of an application filed by Dana Ruark for a new LPTV station at Midland, Texas (ch. 22, File No. BPTTL-920214XS).

Ruark's application was returned because the check that was submitted to cover the application fee was post-dated and, therefore, unacceptable as a fee payment. You state that an erroneous date was entered on the post-dated check inadvertently. Moreover, you have enclosed a letter from Ruark's bank stating that it would honor the check, notwithstanding the erroneous date. Finally, you contend that acceptance of the Ruark application will facilitate provision of community-originated programming.

Section 8 of the Communications Act provides that the Commission may dismiss any application for failure to pay a fee "in a timely manner." 47 U.S.C. 158(c)(2). In this regard, the Commission decided that "all fees will be due in full upon submission of an application." See Establishment of A Fee Collection Program, 2 FCC Rcd 947, 954, recon. denied, 3 FCC Rcd 5987 (1988). A post-dated check is not payable until the stated date, Uniform Commercial Code 3-114(2), and, prior to the stated date it is not a "check" for purposes of the Uniform Commercial Code as it is not payable on demand. Allied Color Corp. v. Manufacturers Hanover Trust Co., 484 F. Supp. 881 (S.D.N.Y. 1980). Thus, submission of a post-dated check does not satisfy the Commission's requirement that the fee be paid with the submission of the application.

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Finally, we are satisfied that there is sufficient public interest in the Commission's consistent application of its fee requirements

to override any temporary delay in the provision of service that adherence to the fee rules may require.

Accordingly, your request is denied. A check in the amount of $425 and made payable to the maker of the original check, will be sent to you at the earliest practicable time.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

DEC 3 1 1992

Richard L. Vega, Jr., President
Phase One Communications, Inc.
3452 Lake Lynda Drive, Suite 115
Orlando, FL 32817

Dear Mr. Vega:

This is in response to your request for reinstatement, nunc pro tunc, of an application filed by Dana Ruark for a new LPTV station at Midland, Texas (ch. 26, File No. BPTTL-920214XQ).

Ruark's application was returned because the check that was submitted to cover the application fee was post-dated and, therefore, unacceptable as a fee payment. You state that an erroneous date was entered on the post-dated check inadvertently. Moreover, you have enclosed a letter from Ruark's bank stating that it would honor the check, notwithstanding the erroneous date. Finally, you contend that acceptance of the Ruark application will facilitate provision of community-originated programming.

Section 8 of the Communications Act provides that the Commission may dismiss any application for failure to pay a fee "in a timely manner." 47 U.S.C. 158(c)(2). In this regard, the Commission decided that "all fees will be due in full upon submission of an application." See Establishment of A Fee Collection Program, 2 FCC Rcd 947, 954, recon. denied, 3 FCC Rcd 5987 (1988). A post-dated check is not payable until the stated date, Uniform Commercial Code 3-114(2), and, prior to the stated date it is not a "check" for purposes of the Uniform Commercial Code as it is not payable on demand. Allied Color Corp. v. Manufacturers Hanover Trust Co., 484 F. Supp. 881 (S.D.N.Y. 1980). Thus, submission of a post-dated check does not satisfy the Commission's requirement that the fee be paid with the submission of the application.

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Finally, we are satisfied that there is sufficient public interest in the Commission's consistent application of its fee requirements

to override any temporary delay in the provision of service that adherence to the fee rules may require.

Accordingly, your request is denied. A check in the amount of $425 and made payable to the maker of the original check, will be sent to you at the earliest practicable time.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

FEB 11 1993

OFFICE OF
MANAGING DIRECTOR

Mark N. Lipp, Esquire
Mullin, Rhyne, Emmons and Topel
1000 Connecticut Avenue, N.W.
Suite 500
Washington, D.C. 20036-5383

Dear Mr. Lipp:

This is in response to your request for refund of the fee submitted by Southern Communications, Inc. (Southern) in connection with its application to upgrade station WSUY(FM), Charleston, South Carolina.

Southern filed an application requesting a change in WSUY(FM)'s operations, including a new transmitter location, and then filed an amendment specifying use of its current transmitter site. Southern also filed a petition for waiver of the minimum distance separation requirements set forth in section 73.215(e) of the Commission's rules due to the short spacing of the proposed transmitter site to a facility at Elloree, South Carolina. The staff denied the requested waiver and dismissed the amendment as unacceptable for filing.

Subsequently, Southern petitioned for reconsideration seeking reinstatement of the amendment. In a supplement to its reconsideration petition, Southern submitted information requested by the staff concerning the Commission's grant of the Elloree application following a change in its channel assignment. In its supplement, Southern argued that its amendment should be reinstated because Elloree's change in channel assignment resolved the short spacing issue. The Bureau denied Southern's petition and request for reinstatement of its amendment because its action dismissing Southern's amendment was not based on erroneous findings of fact or conclusions of law. See 47 C.F.R. § 1.106(d)(2). However, in order to expedite a grant of Southern's application, the Bureau treated its application and amendment as newly filed, assigned Southern a new file number, and granted the application subject to payment of a filing fee.

In response, Southern paid the fee and filed the instant request for refund, arguing that no fee was due because it did not voluntarily file the information supplementing its petition for reconsideration as an amendment, and that the information was already available in the Commission's records and known to the staff due to its recent grant of the Elloree application.

Our review of this matter causes us to conclude that your refund request should be denied. On its own accord, the Bureau treated

Southern's application as newly filed in order to expedite a grant of Southern's request to upgrade its facilities since the application as originally filed could not be associated with its dismissed, but subsequently reinstated, amendment. Absent the staff's reinstatement of its application, Southern would have been required to resubmit its application package, including a new fee payment, prior to any action on its application. Under these circumstances, the Bureau acted consistently with the rules by informing Southern that a new fee was due since its "newly filed" application was the subject of the Bureau's grant. See 47 C.F.R. §§ 1.1106 and 1.1107(a).

Accordingly, your request is denied.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

JAN 25 1993

OFFICE OF
MANAGING DIRECTOR

John M. Spencer, Esquire
Leibowitz & Spencer
Amerifirst Building
One Southeast Third Avenue
Suite 1450
Miami, Florida 33131-1715

Dear Mr. Spencer:

This is in response to your request for a refund of the application fee submitted by Sunshine Beeper Company (Sunshine) with its request for special temporary authority (STA).

Sunshine requested the STA to construct and operate PLMS station KNKK633, Miami, Florida, in order to restore facilities destroyed by Hurricane Andrew. You request a refund of the fee due to the nature of the disaster and in the spirit of the Federal relief efforts directed at ameliorating the damage caused by Andrew.

I regret to inform you that your request cannot be granted. Section 1.1111 of the Commission's rules governing fee refunds makes no provision for the return of a fee paid in connection with an STA request. 47 C.F.R. § 1.1111. Moreover, since STAs are often requested in order to authorize emergency repair and replacement facilities due to destructive acts of nature, we cannot find that the circumstances surrounding the filing of Sunshine's STA request justify a waiver of the fee requirement.

Accordingly, your request is denied.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

*U.S. Government Printing Office: 1993 — 342-145/80013